

J. ALEXIS PORT.

FEBRUARY 11, 1860.—Reported from the Court of Claims; committed to a Committee of the Whole House, and ordered to be printed.

THE COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled :

The Court of Claims respectfully presents the following documents as the report in the case of

J. ALEXIS PORT *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Original documentary evidence transmitted to the House of Representatives.
3. Claimant's brief.
4. United States Solicitor's brief.
5. Opinion of the court on the preliminary hearing, ordering testimony to be taken.
6. Opinion of the court on the final hearing adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this fifth day of December
[L. s.] A. D. 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE UNITED STATES COURT OF CLAIMS.

J. Alexis Port's, claim on account of tobacco sold him in Mexico by the United States.

To the honorable the Judges of the Court of Claims :

The petition of J. Alexis Port, of the city of Puebla, in the Republic of Mexico, sheweth : That he is a French citizen, and has resided in said city of Puebla for more than fourteen years.

Your petitioner would further show, that while the United States army was in possession of said city of Puebla, Colonel Thomas Childs, then acting governor of Puebla, issued an order in the words following, viz:

“HEADQUARTERS, MILITARY DEPARTMENT OF PUEBLA,
“*Puebla, September 12, 1847.*

[“Order No. 23.”]

“Captain Webster, A. Q. M., will sell at auction some captured tobacco, and dispose of the proceeds as he will be hereafter directed.

“THOMAS CHILDS,
“*Colonel Commanding.*”

That in pursuance of said order, Captain Charles R. Webster of the army of the United States, advertised for sale at public auction five hundred bales of tobacco; that the advertisement was made on the 16th day of October, A. D. 1847, for a sale on the 19th of said October, by causing the notices of such sale in Spanish and English to be publicly fixed and placarded on the corners of the principal streets and thoroughfares of the city of Puebla, and that the following is a true copy of the original advertisement in Spanish, and was taken from some public place after the sale of said tobacco:

“AVISO.

O’bre 16 de 1847.

“Se venderá unos quinientos tercios de tabaca, para el 19 del presentes, en el cuartel de Sor. San José, á las tres de la tarde, en venta publica.”

Of which said advertisement the following is a translation:

“On the 19th instant, there will be sold at public auction, at three o’clock in the afternoon, at the cuartel San José, 500 bales tobacco.”

Your petitioner would further show, that on the 21st day of said October, he purchased said 500 bales of tobacco, at twenty-four dollars per bale, amounting to the sum of twelve thousand dollars, and paid for the same the sum of eight thousand dollars in cash, and by a credit to the United States, in account with your petitioner, the sum of four thousand dollars; the United States being at the time indebted to your petitioner for supplies furnished the army.

Your petitioner would further show, that on the 27th day of the same month of October he sold the said tobacco to Señor Don Juan Abadie, a merchant of said city, for the price of thirty-three dollars per bale, amounting in all to the sum of sixteen thousand five hundred dollars. That after said sale, on the 30th day of said month of October, your petitioner received the following notice from Captain Webster.

ASSISTANT QUARTERMASTER'S OFFICE,

October 30, 1847.

SIR: You will please suspend the sale of the tobacco purchased of me for the present. You are, perhaps, aware that the whole is claimed by Señor Domercq.

Your obedient servant,

CHARLES R. WEBSTER.

J. A. PORT, Esq.

Your petitioner would further state, that on the 13th November, 1847, said Señor Abadie sold the same tobacco to Gormio & Co., merchants of the city of Mexico, for thirty-five dollars per bale, amounting to \$17,500, accompanied with a warranty that the said tobacco was his legitimate property, and that he would present the proper documents and certificates of the American authorities, so that the sale might have no obstruction, and the property might be removed at pleasure without any impediment whatever, and that the seller should be responsible to clear up any difficulty which might arise. That on the 15th of said November, Gordon & Murray purchased said tobacco at forty-eight dollars per bale of 214 pounds, amounting to \$21,000, for which they paid in cash, and the said sellers warranted the sale against any difficulties which might arise.

Your petitioner would further show, that after the sale by him of the tobacco, purchased as aforesaid, he was informed that the tobacco was claimed by a merchant of Puebla, of the name of Domercq; and on the 1st November, 1847, General Worth addressed a letter to Colonel Childs on this subject, in which he remarks: "I now learn that by your order the tobacco has been taken out of the hands of Hargous's agent and resold. If so, whatever may have been your necessities in the way of funds for public purposes, a decided wrong has been done to the purchaser," &c.

That on the 17th of said November, by order of General Lane, a board of inquiry, consisting of four officers of the army, was convened at Puebla, for the purpose of examining into the matter, who had before them a communication from Mr. Domercq and your petitioner, and examined as witnesses Colonel Childs and Captain Webster. And a majority of said board declare that they are of the opinion that the five hundred bales of tobacco, sold by Captain Webster to Mr. Port, were not at the time of said sale the property of the United States, and annul the possession and ownership thereof to him, the said Domercq; and that the quartermaster, Captain Webster, pay to Mr. Port \$8,000, with interest from the day of its payment to him, and cancel the credit of \$4,000 to the United States in its account with Port for clothing, &c., supplied.

That on the 30th of said November, Captain Webster addressed a letter to General Lane, stating that Mr. Domercq informed him that the last buyer of the tobacco refused to give up the key, and requested that he would send an officer with a file of men to see that he had possession of what the court had decided was his property, and put him in quiet possession of the same without any further disturbance;

and in pursuance of this request the said tobacco was forcibly seized and delivered to said Domercq.

Your petitioner also shows, that at time of the several sales and transfers of said tobacco as aforesaid, the prices at which the said tobacco was sold were the fair market prices at the time in the city of Puebla, and that when seized by the order of General Lane the market value of said tobacco was at least the sum claimed by said Gordon & Murray, the last purchasers.

And your petitioner humbly and respectfully claims, that the said sale of tobacco was made publicly in open market; that the purchase was made in entire good faith; that the purchase money was paid, and the article delivered; and that the contract has been rescinded, and the property seized, without any fault on the part of your petitioner; and that he is entitled to compensation from the United States for the damages which he has sustained by the act of their own officers; that he has been subjected to the necessity of making full compensation to subsequent purchasers for the losses sustained by them successively, as well as to the direct injury arising from annulling the contract; and that for such loss and damages he should be fully indemnified; and, in accordance with the practice of the government in similar cases, that interest be allowed and such other damages as he has actually sustained.

Your petitioner would present the following statement of the particulars of his claim:

The claim of Gordon & Murray.....	\$3,000 00
The claim of Gomio & Co.....	3,500 00
The claim of Abadie.....	1,000 00

Amount for which petitioner is responsible to third persons before Mexican tribunals.....	\$7,500 00
Amount lost by petitioner.....	4,500 00

Due by United States to J. A. Port in consequence of the annulment and sale.....	\$12,000 00
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The petitioner further claims:

1. Storage and unpacking of tobacco, and interest on \$12,000 by him disbursed.....	711 00
2. Expenses in Mexico during four months.....	600 00
Three voyages to the United States, and expenses therein for three years.....	5,000 00

\$18,311 00

Deduct one month's interest on \$8,000 repaid to petitioner.....	40 00
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\$18,271 00

Your petitioner would further state, that in the year the foregoing claim was presented on his behalf to the Department of State

of the United States, by the French Minister at that time accredited to the Government of the United States, and that said claim was denied on behalf of said Government of the United States by Hon. John M. Clayton, then the Secretary of State.

That your petitioner presented his petition to the Congress of the United States for the allowance of said claim during the 31st Congress; that the same was referred to the Committee of Foreign Affairs in the House of Representatives, which committee, on the 3d day of March, 1851, made an adverse report on the same, which report was by order of the House laid on the table and ordered to be printed.

Your petitioner would further state, that he is the sole owner of said claim, and has assigned no part of the same to any person.

Your petitioner therefore prays your honors to inquire into the matters set forth in the foregoing petition, and, on finding the same to be true, to grant such relief as to law and justice may appertain.

JOHN A. ROCKWELL,
Counsel for J. A. Port.

Statement of claim of J. Alexis Port.

1st. The claim of Messrs. Gordon & Murry.....	\$3,000 00
2d. Claim of Mr. Gomio & Co.....	3,500 00
3d. His own claim.....	1,000 00
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To these.....	\$7,500 00
For which Mr. Port is responsible to the Mexican tribunals, we must add, what he himself lost.....	4,500 00
Due by the United States to Mr. Port in consequence of the annulment of the sale which their agents had made	11,000 00
Mr. Port further claims:	
1. Storage and weighing of tobacco, interest on the \$12,000 by him disbursed during nearly three months	711 00
2. Expenses in Mexico during four months.....	600 00
3. To voyages made to the United States, and expenses therein for three years.....	5,000 00
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Total.....	\$17,311 00
Deduct interest on \$8,000, which interest was repaid to Mr. Port by order of board of officers at Puebla, one month.....	40 00
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	<u>\$17,271 00</u>

IN THE COURT OF CLAIMS.

J. ALEXIS PORT *vs.* THE UNITED STATES.

*List of Papers filed on behalf of petitioner, by J. A. Rockwell, counsel,
June 23, 1858.*

1. Stipulation of Mr. Blair, esq., waiving objection to receiving in evidence papers in the case named below, page 8.
2. Petition to Congress, marked No. 2, pp. 9 to 19.
3. Papers marked No. 3, pp. 20 to 36.
4. Papers marked No. 4, pp. 37 to 69.
5. Papers marked No. 5, pp. 71 to 111.
6. Papers marked No. 9, pp. 112 to 113.
7. Papers marked No. 10, pp. 114 to 150.
8. Papers marked No. 11, pp. 151 to 167.

IN THE COURT OF CLAIMS.

On petition of J. Alexis Port.

Agreement. I have objection to the reading in evidence papers marked Nos. 2, 3, 4, 5, 9, 10, and 11

M. BLAIR,
Solicitor United States.

WASHINGTON, June 3, 1857.

*To the Senate and House of Representatives of the Congress of the
United States.*

The memorial of J. Alexis Port, of the city of Puebla, in the Republic of Mexico, respectfully represents, that he is a French citizen, and has resided in said city of Puebla as a merchant of reputable and unblemished character for more than fourteen years.

While the United States army was in the possession of the said city of Puebla, in pursuance of the order of Col. Thomas Childs, then acting as civil governor of Puebla, Capt. Charles R. Webster, U. S. army, and acting quartermaster, advertised for sale at public auction, 500 bales of tobacco. The following is the statement of Capt. Webster, with a copy of the advertisement :

"I certify that I advertised the sale of tobacco on the 16th October for the 19th October, by causing the notes (notices) of such sale, in Spanish and English, to be publicly fixed and placed on the corners of the principal streets and thoroughfares of this city; and I further certify that the following is a true copy of the original in Spanish, and was taken from some public place after the sale of said article.

"CHAS. R. WEBSTER,

"Captain, and Assistant Quartermaster."

The following is the translation of the advertisement :

"On the 19th inst., there will be sold at public auction, at three o'clock in the afternoon, at the quartel San Jose, 500 bales of tobacco."

Your petitioner became the purchaser of said tobacco, at \$24 per bale, amounting to the sum of \$12,000; and paid for the same the sum of \$8,000 in cash, and by a credit to the United States, in account with him the sum of \$4,000, the United States being at the time indebted to him for supplies furnished the army.

The following is the certificate of Capt. Webster :

“ASSISTANT QUARTERMASTER’S OFFICE,
November 10, 1847.

“I certify that, on the 21st of October, I sold, per order of Colonel Childs, 500 bales of tobacco, at \$24 per bale.”

“CHAS. R. WEBSTER,
Captain and assistant Quartermaster.”

Your petitioner would further state, that on the 27th of the same month of October, he sold the said tobacco to Señor Don Juan Abadie, merchant of said city, at \$33 per bale, amounting in all to \$16,500.

On the 13th November, 1847, Señor Abadie sold the same tobacco to Messrs. Gomio & Co., of the city of Mexico, for \$35 per bale, amounting to \$17,500, accompanied with a warranty that the tobacco was his legitimate property, and that he would present the proper documents and certificates of the American authorities, so that the sale might have no obstruction, and the property might be removed at pleasure, without any impediment whatever, and that the seller should be responsible to clear of any difficulty which might arise.

And on the 15th of November, Messrs. Gordon & Murray purchased this tobacco at \$48 per bale of 214 lbs., amounting to \$21,000, for which they paid in cash, and the seller warranted the sale against any difficulties which might arise.

Copies of the bills of sale, showing the transfers as when duly authenticated, accompany this memorial, to which the petitioner begs leave to refer.

Your petitioner would further state, that after the sale by him of the tobacco, purchased as aforesaid, he was informed that the tobacco was claimed by a merchant of Puebla, of the name of Domercq and on the 11th of November, 1847, General Worth addressed a letter to Colonel Childs on this subject, in which he remarks: “I now learn that by your order the tobacco has been taken out of the hands of Hargous’s agent and resold. If so, whatever may have been your necessities in the way of funds for public purposes, a decided wrong has been done to the purchasers,” &c.

On the 17th of November, 1847, by order of General Lane, a board of inquiry, consisting of four officers of the army, was convened at Puebla, for the purpose of examining into the matter. They had before them a communication from Mr. Domercq and your petitioner, and examined as witnesses Colonel Childs and Captain Webster. The majority of the board declare that “they are of opinion that the 500 bales of tobacco sold by Captain Webster to Mr. Port, was not at the time of the said sale the property of the United States, and award the possession and ownership therefore to him, the said Domercq, and that the quartermaster, Captain Webster, pay to Mr. Port \$8,000, with

interest from the date of its payment to him, and cancel the credit of \$4,000 to the United States, in its account with Port for clothing, &c., supplied."

On the 30th of said November, Captain Webster addressed a letter to General Lane, stating that Mr. Domercq informed him that the last buyer of the tobacco refused to give up the key, and requests that he will send an officer with a file of men to see that he has possession of what the court has decided was his property, and put him in quiet possession of the same without any disturbance; and in pursuance of this request the tobacco was forcibly seized and delivered to Mr. Domercq.

It is not contended, as your petitioner is aware, that at the time of the several sales and transfers of the tobacco as aforesaid, that the price at which the tobacco was sold was above the fair market price at that time, in the city of Puebla, nor that it was not until when seized by the order of General Lane, at least the sum claimed by Messrs. Gordon & Murray, the last purchasers.

It appears from the statement of Mr. Domercq himself, that after the purchase of the tobacco by your petitioner, and before the sale by him, that he offered to your petitioner to purchase it at \$31 or \$32 per bale; and General Lane, in an order confirming the doings of the board of inquiry, directs:

"3. That the quartermaster, Captain Webster, cancel the credit of \$4,000, now at the credit of the United States, against Port, on his books.

"4. That the quartermaster, Captain Webster, retain the sum of \$8,000 paid to him by Port until evidence to his satisfaction shall have been furnished that all the purchasers subsequent to Port shall have been refunded the amount respectively paid by them in the sale and resale of said tobacco.

"5. It is made the special duty of the quartermaster, Captain Webster, to give immediate notice to parties interested, and to see this order carried into effect."

In view of the foregoing fact, your petitioner humbly and respectfully claims that he is entitled to compensation from the United States for the damages which he has sustained by the acts of their own officers; that as he has been subjected to the necessity of making full compensation to the subsequent purchasers for the losses sustained by them successively, as well as to the direct injury arising from annulling the contract of sale. That for such loss and damage he should be fully indemnified; and as it is understood to be the practice in demanding of other nations redress for injuries to its citizens, and is just in itself that interest be allowed, and such further damages as he has actually sustained.

Your petitioner most respectfully claims that the title acquired by him was a valid title, and would be sustained before any court acting under the law of nations; that the seizure and sale of the property of an individual domiciled in Mexico, during the war with that nation, would vest the property in the purchaser; that it was not the duty nor the right of your petitioner to sit in judgment upon the acts of the commander of the American forces, nor to determine to what ex

tent he should exercise the acknowledged rights of a belligerent; that the question as to the degree of mildness or severity with which the law should be prosecuted was a national question, and that your petitioner was authorized to purchase property publicly offered for sale by the commander of the American forces whether the same had been seized by him as the property of the nation or of individuals.

Your petitioner respectfully claims that if the former owner of the tobacco in question, Mr. Domercq, should have instituted a suit before the courts of the United States against your petitioner for the value of the tobacco, on the ground that the seizure and sale had been illegal and void; that upon no principle could the claim be sustained; still less is it consistent with justice and good faith for a nation thus to annul, without just compensation, its own contracts.

It is apparent, too, as your petitioner supposes, that the same view was entertained by all parties at the time this sale was made. Even the former owner of the tobacco himself regarded the title of your petitioner as valid, and proposed to purchase of him the tobacco which he had formerly owned.

Now, all the proof in this case, it is perfectly apparent, as your petitioner insists, that the sale was made publicly in open market, and that the purchase was made in entire good faith; that the purchase money was paid and the article delivered, and that the contract has been rescinded without any fault on the part of your petitioner.

As there is not the slightest proof of any kind, or ground for suspicion of any unfairness on the part of your petitioner, he might safely rest his case on the facts above stated, which are proved undeniably by the evidence accompanying this memorial.

But Col. Thomas Childs, United States army, and then governor of Puebla, in his testimony before the board of officers, has gratuitously and unjustly assailed the reputation of your petitioner; and, by the expression of a *suspicion* of a fraudulent collusion between your petitioner and his own secretary, has not only greatly prejudiced the claim of your petitioner for redress, but for the breach of contract, but has assailed his reputation, and among them to whom he was unknown, has injured his character for integrity, never before questioned.

Your petitioner feels called upon, by a regard for his reputation, to repel the imputation, although based merely on suspicion, and to show that it is not only made without proof, but to prove negatively the *suspicion* to be wholly unfounded.

Col. Childs, says: "Witness is of opinion that the present claimant, Port, was in collusion with the secretary and interpreter, in the tobacco purchase, and that both Port, the secretary, and quartermaster, have been engaged in an infamous attempt to speculate on the tobacco, to the injury of the former purchaser, Domercq. His reason for this opinion is, that so large a quantity of tobacco could not have been sold in Puebla without the fact being known to all the tobacco dealers. The secretary and interpreter died subsequently to the sale made by the quartermaster. Has every reason to believe that the secretary and interpreter was to receive two dollars per bale from the last purchaser, Port; and has been assured that \$1,000 was

due to the estate of Wingierski *vs.* Port, which witness has not yet collected, as he has been waiting the issue of the matter now pending before the court. Witness has no positive knowledge that Port was cognizant of the original sale."

Never were such serious charges made without the pretence of any proof.

The only ground for this *opinion* is, that "so large a quantity of tobacco could not have been sold at Puebla without the fact being known to all the tobacco dealers."

In the first place, it is proved by a number of witnesses that at the time, and before and after that sale was made to Domercq, the petitioner was absent from Puebla. In the next place, his business was not that of a tobacco dealer. But your petitioner respectfully but confidently contends that it is entirely immaterial whether he did or did not hear that this tobacco was the property of Domercq at the time it was siezed by the officers of the United States. It appears from the statement of Col. Childs himself, that "at that time there was no money in the quartermaster's or any other department;" and Gen. Worth, in his letter of the 1st instant to Colonel Childs, understood that the property had been seized for the purpose of supplying the necessary funds. He says, "whatever may have been your necessities in the way of funds, a decided wrong has been done the purchaser," &c.

Doubtless Col. Childs considered the necessity of the case justified him in seizing and selling private property in order to supply the necessary funds.

Certain it is that the United States publicly and forcibly did seize the private property of Domercq, and after due notice publicly sold it. Whether this act of seizure and sale of the property of an individual is justified by the circumstances, is not important. It surely is a strange charge to make by the officer seizing and selling the goods, that the purchaser, if he knew who the former owner had been, is guilty of fraud.

But Col. Childs charges his secretary and interpreter with fraudulently and falsely interpreting the communications from Mr. Domercq to him. It is no part of the duty of your petitioner to vindicate the character of this person, who at the time when the charges were made was drunk; but it is proper to observe that Col. Childs, in a communication to Capt. Scott, acting assistant adjutant general, of the 12th October, 1847, published in the "Flag of Freedom," of the 20th October, the very time of these transactions, says: "To my staff, Lieut. Maddox, acting adjutant general, and my secretary, Mr. Wingierski, I am indebted for most valuable services. They were not only employed in their official duties, but commanding troops, and by day and night were most active and zealous. I cannot sufficiently thank these gentlemen for their services."

And on the 13th October, 1847, in another communication addressed to the same officer, published in the "Flag of Freedom" of the 15th January, 1848, he says: "To Mr. Wingierski, secretary and translator, I am indebted for valuable services. Mr. W., in addition to his appropriate duties, conducted the operations of the spy company,

and through his suggestions and active exertions, I received most valuable information, and many successful expeditions of spies into the city were made. Mr. W. conducted the detachment on the roof of my quarters, and was the first man wounded. From his after efforts his wound proved severe and painful; still he performed his various duties night and day, and is worthy of my approbation."

The reasons of Colonel Childs for supposing that this person had been guilty of fraud are not given, nor any fact to sustain the charge; but whether the charge against the deceased secretary is well or ill founded, in no way affects the character of your petitioner.

Although Colonel Childs says that he has "reason to believe" that there was a corrupt agreement between your petitioner and his secretary, by which the secretary was to receive \$1,000, and that he waited the issue of the matter then before the court before collecting it of your petitioner, yet he has never made any such claim of your petitioner, nor shown the slightest reason for his belief of this most groundless imputation.

Not only is there the absence of the slightest evidence to show any collusion or connexion of any kind between the secretary and your petitioner, but the testimony is direct and positive that at the time when these communications were made by Mr. Domercq through the secretary, he was and had been long before that time absent from the city of Puebla, and returned to that city from Atlisco on the 14th day of October, having been absent from Puebla between that time and the 10th of September previous.

In addition to this, your petitioner would refer to the testimony of Captain Webster, who was personally conversant with the entire transaction, as given before the board of officers. He says: "Witness thinks there could have been no dishonest collusion between Port and Wingierski; has had many transactions with Port, and always found him upright and honest in his dealings."

Your petitioner, in order to sustain his reputation as a man of integrity and a merchant of reputable standing, asks the attention of Congress to a certificate signed by a large number of the principal citizens of Puebla, and duly authenticated. They say "that since the year 1836, when Mr. Alijo Port, a French citizen, settled in this city, he has observed a very proper conduct, exhibiting in all his commercial transactions an honor, legality, and good faith, without the slightest fault being perceptible in him."

And after all these transactions, and nearly a month after the approval of the doings of the board by General Lane, that officer causes the following letter to be written:

"PEUBLA, *December 14, 1847.*

"SIR: I am instructed by General Lane to recommend to the General-in-chief Mr. Alexander Port, a Frenchman, and resident of this city. He has been very useful to the troops at this place in procuring clothing, forage, &c., and has ever proved a firm friend of the Americans. Private business requiring his presence in Mexico, Gen.

Lane deems it his duty to recommend him to the notice of the General-in-chief.

"I am, very respectfully, your obedient servant,

"THOS. J. WHIPPLE.

"To Captain H. L. SCOTT,
"A. A. A. General."

Your petitioner regrets that the wanton attack which has been made upon his character has rendered necessary so full a vindication of it from very serious but entirely groundless charges. He regrets still more that a private affair of his own, of comparatively so small a pecuniary amount, should have been the occasion of interrupting in the least degree the most friendly feeling between the representatives of the two nations.

He relies solely upon the justice of his claim for redress, and trusts that Congress will give an impartial, candid, and just examination of it, and grant to him such measure of justice as they award to the humblest of their own citizens.

J. A. PORT.

WASHINGTON, *April 16*, 1850.

NOTES.—No. 1.

[Translation.]

PUEBLA, *October 27*, 1847.

Senor Don Juan Abadie, merchant of this city, to pay to A. J. Port by the arrival of the first conducta,) DR.

To 500 bales tobacco at \$33..... \$16,500

No. 2.

[Translation.]

PUEBLA, *November 13*, 1847.

El Senor Don Juan Abadie, of Puebla, has sold, by my intervention, to Mr. M. Munguiro, agent of Messrs. Garcia & Co., of Mexico, the following, delivered in the city of Puebla and the full amount paid in Mexico, with drafts of the purchasers, (follows drafts :)

The 500 bales tobacco of Orizaba are satisfactory to the purchaser ; each bale of 200 pounds, at \$35 00 each, \$17,500.

The seller assures that the said tobacco is his legitimate property, and will present the proper documents and certificates of the American authorities, so that the sale may have no obstruction, and the property may be removed at pleasure, without any impediment whatsoever; the said seller to be responsible to clear up any difficulty which may arise.

No. 3.

PUEBLA, *November 15, 1847.*

Sold to Messrs. Gordon & Murray 500 bales tobacco, marked A. C. 1 to 500, at \$48 per bale of 214 pounds, say \$20,000, which he has paid me in cash, and I warrant the sale against any difficulties which may arise.

No. 4.

PUEBLA, *November 19, 1847.*

I have sold to Dr. V. del Poso, of Mexico, \$500 bales tobacco at \$48 = \$24,000; which sum he has fully satisfied in silver coin; he having received and being satisfied with the said tobacco, which he received through the broker, Jose Antonio Bueno.

No. 5.

Duplicate.--[Translation.]

PUEBLA, *November 16, 1847.*

DEAR SIR: The bills of exchange (1st and 2d) which I have remitted to you for \$17,500, drawn by Mr. Munguiro on Messrs. Garcia & Co., and endorsed by me, to your order, are hereby annulled, until some difficulties are arranged, which have occurred in this business.

I have, therefore, received these bills, for which reason I request you will do me the favor to have them delivered (the 1st and 2d) without the receipt of Messrs. Garcia & Co., returning to these gentlemen the aforesaid sum of \$17,500, in case they have paid it, or any other sum delivered by them, at the receipt of this letter.

I remain, respectfully, your obedient servant,

JUAN ABADIE.

Mr. GIL ORIOI, *Mexico.*

No. 6.

[Translation.]

PUEBLA, *October 31, 1847.*

SIR: In answer to your letter of 30th instant, I have to say that on the 27th of the same month I sold to Mr. John Abadie, of this city, the 500 bales tobacco.

Respectfully, your obedient servant,

J. A. PORT.

Capt. C. WEBSTER,

Assistant quartermaster U. S. Army.

No. 7.

Copy of the protest made before the national and public notary, Don José Mariano Torres Torija, in Puebla, on the 30th of Novem-

ber, 1847, by Mr. Juan Alejo Port, in order to demand damages and costs which have been occasioned to him by the failure of fulfilment of the contract of public sale which was made to him of five hundred bales of tobacco, as is within set forth :

In Puebla, on the thirtieth of November eighteen hundred and forty-seven, before me, the notary, and witnesses, M. Juan Alejo Port, a native of France and resident of this capital, whom I certify that I know, requested me to see, as in fact I did see, if by the receipts from the landlord, which are in his possession, it appears that in the house of Don Diego Cervantes, number seven in the street del costado de San Pedro, in this city, he holds, by renting, some warehouses, which he occupies with his mercantile effects ; and that I should proceed to certify, as I do certify what had been done at his doors, and what in fact occurred namely : that I saw, at half-past three o'clock this afternoon, the two doors of those warehouses open, and one (which is the small one on the left hand, leading to them, situated on the side of the court facing the east) broken in the wood-work near the place where the lock is, and the rails torn up or wrenched from the wood, which doubtless preceded it ; perceiving that it was forced, so as to allow of its being broken open, and that from those warehouses were being removed carts-full of bales of tobacco, and at the entrances of the same were some uniformed and armed soldiers of the North American army sustaining or guarding that removal or extraction. This truth being held as proven, and he truly states that those occurrences took place in the house of Mr. Port, and with the goods which were there existing, the same person requested me that, upon that fact, Don Carlos Dujah, doctor of medicine, Don Antonio Latassie, merchant, and Don Alonzo Neron, warehouseman, might depose before me, under the religion of an oath, as they did in fact do, and being present they did unanimously say : that at a quarter before one o'clock this afternoon an officer and eight soldiers, North Americans, doubtless by superior orders, went to break open those doors and take out the bales of tobacco which were found therein, as was publicly and notoriously seen, this proceeding being, in their opinion, a grievous injury to Mr. Port, since they knew perfectly well that, as the legitimate owner of that tobacco, he was proceeding to sell it to Mr. Juan Abadie, he having to fear the consequences of the failure to fulfil or complete the respective contracts. They added that they were over age, and that the generalities of the law do not touch them, ratfying their deposition in form ; in virtue whereof, and of what is by me certified as seen, Mr. Port stated to me, that being called together publicly by hand-bills issued by the North American quartermaster on the sixteenth day of October last to bid for five hundred bales of tobacco ; among other bidders, deponent was one, to whom was sold that number of bales at twenty-four dollars, and the whole amounting to twelve thousand dollars, which he produced, giving eight thousand on the twenty-first of said month, and four thousand on the fifth of November, and receiving the goods publicly from the said quartermaster on the twenty-first, twenty-second, and twenty-third of the same October. That, securing his ownership by a contract as public as, in his opinion, it was solemn and legal, the price being paid, and he

being put in possession of the goods, he made sale of them to Mr. Juan Abadie, merchant, of this town, for the price of sixteen thousand five hundred dollars, at thirty-three dollars per bale, according to the account which I saw.

That, afterwards, the quartermaster, on the thirty-first day of said October, wrote to him advising him not to dispose of said tobacco until further order; and, finally, the civil and military governor of this post, by a decision made in military tribunal, ordered him to restore the tobacco and to be reimbursed the price which he gave for it, affirming that he had done the same towards Abadie, and the latter with the person to whom he had sold it; that these successive reimbursements were made, but the appearer could not, of himself, restore the tobacco, because the keys of the warehouse were in the hands of the agent of Messrs. Garcia & Co., of Mexico, as an evidence of the delivery and abandonment of the ownership, without the account and charge of the first litigant being still current, who could not either dispose of them at the time, the contracts being held as closed, and this gave rise to the breaking open of the doors and the forcible removal which he has deposed and certified; so that, notwithstanding the blamelessness of which he speaks, not only has the failure of benefits which he would have derived from the contract not inured to him, but he has incurred the obligation of consequences, for which his purchaser looks to him, no less than the smaller damage to the building and the expense it has caused him, he believes it to be essential to him to make against whom it may concern the proper claim; for which purpose, discarding uncertain date, I certify the good faith of his proceedings, and, being persuaded of its justice, by the present, in due manner and form, and for the ends which may be proper in law, from this time forth I protest once, and as often as may be necessary, against the illegality with which, the consequences being considered, the alienation has been made of his property by the said quartermaster: because of the sentence which declared unsubstantial the auction and sale, and the contract to be rescindible, having been injurious to him; because of the haste, oppression and force with which the tobacco was taken from the warehouses belonging to him; and, finally, for everything that has occurred in the matter in violation of his rights—the whole with the object of demanding, in the manner, when, where and from whom it may concern, both the four thousand five hundred dollars of profits which he had gained, and the one thousand dollars which he failed to realize, and which Mr. Abadie has demanded of him, as being those which he gained in his trade with Messrs. Garcia & Co., save those which those gentlemen claim against him, (conformably with the bill of contract which he showed to me,) and such other damages, injuries, and costs, as have been caused to him and shall arise, until entirely satisfied, saving as, he does, his actions and appeals of all kinds; with whatever of fact and right may favor him, he solemnizes this protest with the oaths, stipulations, and requisites which may be required, and which may make it legally efficacious, before the proper authorities; desiring that they, and especially those of the United States, may be pleased in the same manner to supply any material defect which may be noted, and requesting that, in order to

make before the same and any other which may be of importance to him his subsequent uses, there may be issued to him at the times he shall ask for it a faithful copy of this protest, which he signed with the declaring witnesses, Don Antonio Hernandez, Don José Maria Torres Toledo, and José Maria Irrijano, of this town, being assisting witnesses. I certify Alfonso Neron, Carlos Dufat, Antonio Latassie, J. Alejo Port. Before me,

JOSE MARIANO TORRES.

This is the original copy made the day of its date at the request of Mr. Port, on four leaves of common paper, and its draft appears in the current protest in my possession, to which I refer. I certify,
JOSE MARIANO TORRES. *N. and P. N.*

No. 8.

[Fourth Tribunal.]

PUEBLA, *December 6, 1847.*

Mr. Juan Abadie will appear at ten o'clock, with his surety, in order to make a settlement for money, which Mr. Manuel Munquira requires of him, it being understood that, if he does not appear, the judgment will be considered as confessed conformably to law, and the certificate will be given.

REYES.

Second citation.

[5th Seal.]

(Stamp.)

[Half real.]

I, citizen Pedro de Leon Valasquez, Regidor de cano del I. A., of this capital, in which I act in compliance with the law, with assisting witnesses, as there is no notary public:

Certify in due form that on the day of the date hereof, before me the undersigned judge, appeared the French citizen Alejo Port, merchant of Puebla, requesting that the three witnesses whom he hereby presents may be examined, so that under the religion of an oath they may declare if the party interested has been a citizen of this place; in what year he became so, and how long he remained there; for which object, and in order to comply with his request, I directed him to retire, and having present the first witness, I administered to him the oath in due form that he should answer truly to what should be asked of him, and being so questioned, in a general manner, he said that his name was Ignacio Campos; that he is a native and resident of this capital, a widower, a merchant, and aged fifty-six years. Being questioned as to the minutia to which Mr. Alejo Port refers, he said that he knows it to be true that said gentleman was in this town from the 2d of May to the 30th of July, in the year 1847; that what he has

set forth is all he has to say, and which, in testimony of its truth, he signed at the foot with me and the assistants.

The first witness having retired, the second appeared, and, having been duly sworn, he promised to speak the truth as to what should be interrogated him; and having been questioned in a general manner he said his name was Jose Fuentes de Maria; that he was a Spaniard, a resident of this town, married, a merchant, and aged fifty years. Being questioned in the same manner as the former, he said: that from the 2d of May, 1847, until the 30th of July of the same year, the aforesaid Mr. Alejo Port was in this town, and lodged in his own house, transacting business appertaining to his commercial pursuits; that what he has set forth is the truth, and for proof hereof he signed it before me and the assistants.

In continuation, and the second witness having retired, the third one was brought before me, to whom I administered the usual oath, and by which he promised to speak the truth as to what should be asked of him, and being questioned in a general manner, he said that his name was Miguel Hernandez; a native and resident of this town; married, a merchant, and aged twenty-eight years. Being questioned in accordance with the wishes of the party interested, he said that he knows that Mr. Alejo Port came to this town on the 2d day of May, in the year 1847, and remained here till the 30th of July of the same year, at which period he closed the business for which he came, which had relation to commercial affairs; that he has no more to say on the subject; that he ratifies what he has set forth, signing with me, &c.

Inasmuch as the above statements, the desire of the party interested is satisfied, at his request, and for the uses which may be proper for him, I ordered the present to be extended, which the witnesses signed with me and the assistants, in Chietta, on the 23d day of the month of August, in the year 1849.

PEDRO LEON VALASQUEZ.

MIGUEL HERNANDEZ.

ING. CAMPOS.

JOSE FUENTES DE MARIA.

JESUS MARTIERO.

JN. FRANCISCO MACORA,

Assistants.

[L. s.] In this perfecture is recorded the contents of the foregoing.
JOSE M. PAVON.

MATAMORAS, *August 24*, 1849.

[4th Seal.]

(Stamp.)

[One Real.]

I, citizen Blas Paredes, 2d constitutional alcalde of this city, certify, in the best form of law that is permitted to me: that the French citizen Alejo Port, a resident and merchant of Puebla, having appeared before me requesting that the witnesses whom he in the act presented might be examined to prove:

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1st. That on the 28th day of the month of April, 1847, he arrived in this city, whence he departed on the 30th of the same, bound to Chietla.

2d. That on the 30th day of July of the same year he returned from that place, and afterwards went to Puebla.

3d. That on the 10th day of September he returned to this city, stating that he had left that place on account of the state of siege in which it was; and

4th. That on the 14th day of October of the same year, he returned to the said city of Puebla, with a passport issued by the Mexican General Citizen Juan Alvarez.

Conformably with his request I ordered one of the witnesses presented to be examined, who, having been duly sworn, stated that his name was Alofo Lelierre, a native of Paris and a resident of this city, married, a merchant, and aged forty-seven years, and being made acquainted with four points above referred to, he declared that what was contained in them was true.

A like deposition under the religion of an oath was given to Angel Garcia, adding that such was his name; that he is a native of Jalapa, a resident of this city, unmarried, a merchant, and aged twenty-four years.

The third witness, who was Mariano Falcon, after the formalities prescribed by law, stated that he was so named; that he is a native of Puebla, a resident of this city, married, employed in the collection of the national revenue, and aged forty-five years; and being like the others informed, he said, that although he cannot with precision testify what might have been the dates of the arrival and departure from this city of the person whom he is present to declare about, yet he knows that it was about that period, and if there was any difference it would be only two or three days.

Their respective depositions having been read by the witnesses they affirmed to them and ratified their contents, and the party interested not having any other to present, and at his request, I extend the present in Atlisco, this 25th day of the month of August, 1849, the deposing witnesses and assistants with whom I act, for want of a notary, signing with me.

BLAS PAREDES.
AO. LELIERRE.
ANGEL GARCIA.
MARIANO FALCON.

LOUIS CARDENAS.
RUMON F. BRAVO,
Assistants.

The foregoing certificate is proven to me to be extended by the 2d constitutional of this city, and that the signatures which attest [L S.] it are those which the parties who testify are accustomed to use. Date as above.

JE. ANTO. SENANO.

[4th Seal.]

(Stamp.

[One Real.]

Petition.

I, the undersigned notary, certify that Mr. Jose Alejo Port presented to me a statement of the following tenor: I, Alejo Port, a French citizen, whose letter of protection (*carta de seguridad*,) I do not present, having been absent from the Republic, protesting that I will exhibit it as soon as I receive it, before you, with the proper protests, say, that it being necessary to prove the days when I left and returned to this capital when it was invaded by the North American army, you will be pleased to order that the witnesses present be examined under the religion of an oath, conformably with the following interrogatory: First, let them state their names and other generalities; second, let them state if, on the 27th of April, 1847, I left this capital for Atlisco, whence I returned the 1st of August of the same year; third, that on the 9th of September following, I again left this city for Atlisco, on account of the siege by the Americans; fourth, that I returned to this city on the 14th of October of the same year; fifth, let them state if it is true that on the 14th of December of said year I left this city for the capital of Mexico; sixth, let them state if it is true that I returned to this city from said capital on the 11th of June, 1848. This information being received, in all sufficiency, which I protest to be alone favorable, you will be pleased to order that the original be given to me for the uses that may be proper for me. I request you to provide as I desire.

JOSE ALEJO PORT.

PUEBLA, *October 5, 1849.**Decree.*PUEBLA, *October 5, 1849.*

Let the information offered be taken, and let it be delivered to Mr. Alejo Port as he requests. Thus the second *alcalde* of the capital ordered before me, which I certify.

FRANCISCO CASO.

Before me:

JUAN PEDRO NECOECHEA.

On the 6th of the same, appeared as a witness for the information which is ordered to be received, Mr. Elias Lamarque, who being duly sworn and interrogated conformably with the foregoing petition, said, to the first question, he is named as stated; he is a native of France, and resident of this city; a bachelor, aged thirty-five years; an apothecary, and that the generalities of the law do not affect him. To the second, that he knows, and is certain, that on the 27th day of April, 1847, Mr. Alejo Port left this city for Atlisco, whence he returned on the 1st day of August of the same year. To the third, that its contents are true. To the fourth, that on the 14th day of October, of the said year 1847, he returned to this city. To the fifth, that he again left this city, bound for the capital of Mexico, on the 14th day of December, 1847. To the sixth, that he knows that the said Mr.

Alejo Port returned to this city from the capital of Mexico on the 11th day of June of last year, 1848. That what he has set forth is public and notorious, and the truth, by his oath by which he ratified when it was read to him as his deposition, which he signed with the judge before me, which I certify.

LAMARQUE.

Before me :

JUAN PEDRO NECOECHEA.

Afterwards appeared as a witness, Mr. Miguel Garcia, who being sworn and questioned as the former, said, to the first question, that he is named as stated, a resident and merchant of this city, married. and aged twenty-three years; that the generalities of the law do not affect him in the matter which he presents. To the second, that he knows that on the 27th of April, 1847, Mr. Alejo Port left this city for Atlisco, having returned the 1st day of August of the same year. To the third, that the contents of that question are correct. To the fourth, that it is also true. To the fifth, that he knows and is certain that the said Mr. Alejo Port, again left this city for the capital of Mexico on the 14th day of December of the said year, 1847. To the sixth, that he returned from that capital to this city on the 11th day of June, 1848. That what he has set forth is public and notorious, and the truth by his oath by which he ratified this his deposition when read to him, which he signed with the judge before me, which I certify.

MIGUEL GARCIA.

Before me :

JUAN PEDRO NECOECHEA.

Immediately afterwards appeared as a witness, Mr. Manuel Zetina, who being sworn and interrogated as the former, said, to the first question, that he is named as stated; a native and resident of this city; a merchant, married and aged thirty-eight years, and that the generalities of the law do not affect him in the matter which he presents. To the second, that it is true that on the 27th day of April, 1847, Mr. Alejo Port left this city for Atlisco, having returned the 1st of August of the same year. To the third, that he knows that the contents of this question are true. To the fourth, that it is also true. To the fifth, that in the same manner the contents of that question are true. In the sixth, that it is true that on the 11th day of June, 1848, Mr. Alejo Port returned to this city from the capital of Mexico. That what he has set forth is public and notorious, and the truth by his oath by which he ratifies this declaration on its having been read to him, which he signed with the judge before me, which I certify.

MANUEL ZETINA.

Before me :

JUAN PEDRO NECOECHEA.

Record.

In two leaves these proceedings are delivered to Mr. Alejo Port, in fulfilment of what was ordered.

NECOECHEA.

PUEBLA, October 6, 1849.

At the request of the party interested I make the present, which agrees with its original to which I refer, in Puebla, this 8th of October, 1849, Don Antonio Hernandez, Don Joaquin de Unutia, and Don Jose Maria Vasquez of this vicinity being witnesses.

JUAN PEDRO NECOECHEA.

Notary Public.

We certify that the signature and mark which precede are these of Don Juan Pedro Necoechea, notary public, and of the oldest notariat of the superior tribunals of this State, faithful, legal, and of every confidence; and therefore, to whatever they certify, is and should be given entire faith and credit, judicially and extra-judicially. In testimony whereof, we make the present in Puebla, on the 8th day of October, 1849.

JOSE MORIA FELLO.

JOSE RAF'L OREA.

GREGORIO SANDOVAL.

[4th Seal.]

(Stamp.)

[One Real.]

I, Lorenzo Fernandez, commissary general of the State of Puebla, in the Mexican Republic, certify: that the French citizen Jose [L. s.] Alejo Port, a resident and merchant of this city, since the year 1836, has made several contracts with the supreme government, and this commissariat general of clothing for troops, complying exactly in them with the honor and punctuality which characterize him; I also certify that his conduct in public has made him always worthy of particular esteem. In testimony whereof, at the solicitation of the party, I give the present in duplicate, in Puebla, this 8th of October, 1849.

LORENZO FERNANDEZ.

[4th Seal,]

(Stamp.)

[One real.]

I, Jose Maria de Guadalupe Pavon, prefect of this capital and department, certify: that Mr. Alejo Port, a French citizen, has [L. s.] exhibited a passport which was issued to him by the supreme government of the State, of which a record was made by the prefecture which is now under my charge, and at that time under charge of Colonel Rafael Espinosa, which document is dated the 18th of December, 1838, residing then in this State since the year 1836, during all of which period the said Mr. Port has observed, according to said prefecture's notice, the best conduct and fidelity in all his contracts which as a merchant he has made in this place.

And at the request of the party for the purposes that may be useful to him, I give him the present in duplicate in Puebla, October 10, 1849.

JOSE MARIA D. G. PAVON.

[4th Seal.]

(Stamp.)

[One Real.]

I, the secretary of state of the supreme government of the free and sovereign State of Puebla, certify: that Mr. Alejo Port, a French

citizen, by means of a statement made before the 2d alcalde of this capital, is accredited by the sworn deposition of three individuals engaged in commerce, in his good conduct and fidelity in his contracts; circumstances which are also known to this government. In virtue whereof, and by order of his excellency the governor, and for the uses that may be valuable to him, I give the present in Puebla, this 15th of October, 1849.

[L. s.]

JOSE M. FERM.
Secretary.

[4th Seal.]

(Stamp.)

[One Real.]

We, the undersigned, resident merchants of this capital, certify as far as may be and the law permits, that since the year 1836, when Mr. Alejo Port, a French citizen, settled in this city, he has observed a very proper conduct, exhibiting in all his commercial transactions an honor, legality, and good faith, without the slightest fault being perceptible in him. We give the present at the request of the party interested, for the uses that may be proper for him, in Puebla, this 16th day of October, 1849.

Wischey & Co.
Vr. Echerique.
José E. Mujica y Osorio.
Joaquin de Hard y Tumarez.
Man'l G. de la Mata.
Tomas Maceos.
Manuel Perez.
Uriarte Humanos.
Andres Torres.
Mig'l Garcia.
Cosme Furlong.

Alfonso Neron.
Jose Mur'o Buen Abao.
Juan Chrisost'o de Lizadla.
B. Raso.
G. Samin.
Fran'co Blanc.
J. de la Garca.
Jose Joaquin Ramierz.
Roberto Smith.
L. Romes.
A. Dasque.

We certify that the signatures of Messrs. Jose Maria Pavon, Jose Antonio Serrano, Lorenzo Fernandez, Jose Maria de Guadalupe Pavon, and Jose Maria Fernandez, which are at the foot of documents on pages 1, 2, 3, and 4, 7 and 8, 9, and 10, are the true handwriting of said persons, and that they at present fill the offices they mention in their attestation; so also all those which are on the preceding page 11, are those of the gentlemen who signed them, the same they are accustomed to use, and to which are and should be given entire faith and credit in court and thereout. In testimony whereof, we make the present, in Puebla, this 26th of October, 1849.

GREGORIO SANDOVAL.
JOSE DEL RASO.
JUAN PEDRO NECOECHEA.

The underwritten notaries who, at the foot sign and mark, certify that Messrs. Gregorio Sandoval, Jose del Raso, and Juan Pedro Neccochea, are notaries public of the city of Puebla, and the foregoing signatures are theirs, to which are to be given entire faith and credit.

In testimony whereof, we give the present at Mexico, this 29th of October, 1849.

MANUEL DE MADANAJO.
FERMUNI VILLA.
FRAN'CO CALAPSIS.

[Attested by the American Consul at Mexico.]

WAR DEPARTMENT, *Washington, December 8, 1849.*

SIR: The proceedings in the case of Mr. Port, at Puebla, Mexico, were requested by you on the 23d of October last. The original papers having been obtained from the commander-in-chief, in New York, a copy of them is herewith enclosed in compliance with your request.

I have the honor to be, very respectfully,

Your obedient servant,

GEORGE W. CRAWFORD,
Secretary of War.

Hon. J. M. CLAYTON, *Secretary of State.*

WAR DEPARTMENT, *Washington, February 22, 1849.*

SIR: Mr. Port, a French citizen, has presented a claim for damages sustained by him in consequence of the seizure of 500 bales of tobacco, by order of General Childs.

It appears incidentally in the proceedings of a board of officers at Puebla, that this tobacco was part of a quantity belonging to one Domercq, which was seized by General Childs under the belief of its being the property of the Mexican Government, and after the siege of Puebla, was sold by you at public sale to one Wingierski, and by him to Mr. Port; subsequently, on the claim of the owner, Domercq, it was taken from Mr. Port and delivered up.

You will please report to this department the circumstances of the transaction fully, so far as they bear upon the merits of Mr. Port's claim and the damage sustained by him.

Very respectfully, your obedient servant,

W. L. MARCY,
Secretary of War.

Captain CHARLES R. WEBSTER,
Late Assistant Quartermaster, Boston, Mass.

Proceedings of a Board of Inquiry held at Puebla, (Mexico), the 17th day of November, 1847, by virtue of the following order:

HEADQUARTERS, DEPARTMENT OF PUEBLA,
[Order No. 118.] *Puebla, November 17, 1847.*

A board of inquiry will convene this morning at ten o'clock, at brigade headquarters, to inquire into the merits of certain claimants to a lot of tobacco recently sold by Captain Webster, quartermaster.

Colonel Brough, 4th Ohio volunteers, Lieutenant Colonel Dumont, 4th Indiana volunteers, Captain Pugh, Ohio volunteers, will constitute said board.

Lieutenant Waters, Louisiana mounted volunteers, will act as recorder of said board.

By order of General Lane :

H. RIDGELY,
1st Lieut. 4th Infantry, A. A. A. General.

The board met pursuant to the above order, present: Colonel Brough, 4th Ohio volunteers, and associate members, Lieutenant Colonel Dumont, 4th Indiana volunteers, and Captain Pugh, Ohio volunteers.

The board having been duly sworn, in presence of the parties, J. R. Port, and J. B. Domercq, who were each first duly asked if they had any objection to any member of said board, and who each answered in the negative, adjourned till tomorrow, the 18th November, 1847, at 9 o'clock A. M.

BOARD OF INQUIRY,
Puebla, November 18, 1847.

The board convened this day at the hour appointed: Present, Colonel Brough, and Captain Pugh; absent, Lieutenant Colonel Dumont and the recorder, Lieutenant Waters, engaged on active service. There not being a full board, an adjournment was ordered by the president till to-morrow, the 19th November, 1847, at nine o'clock A. M.

BOARD OF INQUIRY,
Puebla, November 19, 1847.

The board met pursuant to adjournment: Present, Lieutenant Colonel Dumont, Captain Pugh, and the recorder, Lieutenant Waters; Colonel Brough absent by reason of severe indisposition. Major Young, 4th Ohio volunteers, appeared, and, after having been duly sworn, took his seat as a member of the court in virtue of the following order:

HEADQUARTERS, DEPARTMENT OF PUEBLA,

[Order No. 122.]

Puebla, November 19, 1847

Colonel Brough, 4th Ohio volunteers, is relieved from duty on the court of inquiry, constituted as per order No. 118. The court will now consist of Lieutenant Colonel Dumont, 4th Indiana volunteers, Major Young, and Captain Pugh, 4th Ohio volunteers, who are required to assemble forthwith for duty.

Lieutenant Waters, Louisiana mounted volunteers, will act as recorder.

By order of General Lane :

S. DOUGLASS,
1st Lieutenant and Aid.

The claims of both parties were then read, having been presented in writing, (see documents marked A and B,) and the court proceeded to the examination of witnesses.

Colonel Thomas Childs, civil and military governor of the department of Puebla, being first sworn, was desired by the court to state all within his knowledge relative to the matter before the court, and answered as follows :

The first knowledge witness had of any tobacco being in San Jose was derived from information submitted to him by Captain Webster, depot quartermaster, some ten or fifteen days after the army had left for the city of Mexico ; there was at that time no money in the quartermaster's or any other department here. Supposing the tobacco to be the property of the United States, witness directed the quartermaster to sell the same ; in consequence of the position of affairs at the time, no purchaser could be found for a single pound. During the siege, his secretary and interpreter, Mr. Wingierski, informed witness that a quantity of tobacco was deposited in a building one square beyond the position occupied by the Americans ; witness immediately ordered out a guard, seized the tobacco, and used it for fortifications along his chain of sentinels ; the number of bales was 135, or 235, witness does not recollect which. The siege being raised, Mr. Domercq (witness thinks on the day the siege was raised) called upon the witness at his office, and through his secretary and interpreter stated, (as it was interpreted to witness,) that Mr. Hargous was the agent for the tobacco. Knowing that Mr. Hargous had been an agent for the United States in many transactions, witness supposed him to be merely the agent for the government for the sale of the tobacco, captured by General Worth, and that this was the tobacco remaining on hand, and replied that it was all very right if Mr. Hargous was the agent, whereupon Mr. Domercq withdrew. Witness had reason to believe that the secretary and interpreter falsely interpreted the representations made on various occasions by Domercq, and that he took means to prevent Domercq from seeing witness by evasive answers. Witness was not aware of any sale made to Domercq, but supposed the tobacco government property, until after it was advertised for sale, when a third party (a friend of Domercq) called on witness and exhibited bills of sale which satisfied him that it was not government property. Witness immediately sent orders by the third party to stop the sale ; he had been previously told by the secretary and interpreter when he asked how it was that the tobacco was to be sold, that it was too late ; that the tobacco was advertised for sale, and that his remedy must be against the United States ; it was after this that the third party called on the witness and exhibited bills of sale. Witness is of opinion that the present claimant (Port) was in collusion with the secretary and interpreter in the tobacco purchase, and that both Port and the secretary and interpreter have been engaged in a nefarious attempt to speculate on the tobacco to the injury of the former purchaser, Domercq. His reason for this opinion is, that so large a quantity of tobacco could not have been sold in Puebla without the fact being known to all the tobacco dealers. The secretary and interpreter died subsequently to the sale made by the quartermaster.

Has every reason to believe that the secretary and interpreter were to receive two dollars (\$2) per bale from the last purchaser, (Port,) and has been informed that one thousand dollars (\$1,000) was due to the estate of Wingierski by Port, which witness has not yet collected as he has been waiting the issue of the matter now pending before the court. Witness has no positive knowledge that Port was cognizant of the original sale; submits two papers from General Worth, (Doc. C and D,) received by him since the last sale. Since the death of Wingierski, many circumstances have come to the knowledge of witness, which induce him to believe Wingierski to have been capable of almost any dishonest act; has discovered that on a number of occasions false interpretations have been made of communications had between himself and other parties.

Cross-examined by the claimant, Port.

Question. Did you not come to the quartel on the 23d of October—the day the delivery of the tobacco to me took place?

Answer. Does not recollect having been in the quartel since the siege was raised; never to his recollection saw Port before the present time; knew that the tobacco was in San Jose; never knew the particular building in which it was stored; had no control over it, further than the orders given to the quartermaster, as already stated.

At request of claimant Port, claimant Domercq was then sworn, Port being previously advised by the court that the testimony, if called for by himself, must be taken without exception.

Question. Did I not, on several occasions, inform you that I intended to buy the tobacco?

Answer. The first time I ever heard anything on the subject was one day when Port called, in my hearing, to the son of the Spanish consul, and asked him if he did not wish to join him in the purchase of the tobacco; the reply to which was, “no; for it is the property of a friend, and you will make yourself liable to reclamations.” Some day or two after, Port told witness he had purchased five hundred (500) bales of the tobacco, and asked him if he did not wish to join him in the purchase, to which he replied in the negative, for he did not wish to purchase his own property; Port answered that that made no difference; that he could always interpose his claims.

Question. On the 23d of October did you not come to San Jose, and converse with me on the subject of the tobacco, at the time its delivery was being made?

Answer. Witness perfectly recollects having been at San Jose on the day the tobacco was delivered to Port; went into the warehouse, saw Port, who told him he was receiving five hundred (500) bales, and that, after the delivery of that quantity, there would not remain much in store; told Port that there ought to remain in store more than eight hundred (800) bales, inasmuch as the receipt of the quartermaster called for thirteen hundred and twenty-five (1,325) bales.

Question. On the 1st of November did you not, at Mr. Abadie's house, ask me to give you the marks, (Doc. E,) as per document presented, of the tobacco?

Answer. Yes ; I have a contract with the city government of Mexico, by which I am bound to deliver thirteen hundred (1,300) bales of tobacco, and having but seven hundred (700) bales in possession, I called on Mr. Port to know the marks of what he had, as in the event of failure in my application to General Lane, it would be necessary to purchase, where I could find it, enough to fill out my contract.

Question. On the next day did you offer me (\$31 or \$32) thirty-one or thirty-two dollars per bale for the tobacco?

Answer. I did make such an offer, because I wished to be sure where I could obtain the tobacco in the event of failure in my application to General Lane. Had I purchased, it would have been conditionally, subject to General Lane's action on said application.

The court then adjourned till to-morrow, the 20th of November, 1847, at 9 o'clock a. m.

BOARD OF INQUIRY,
Puebla, November 20, 1847.

The court met pursuant to adjournment.

Captain Webster being duly sworn, testified that, by order of Col. Childs, he sold (500) five hundred bales of tobacco ; the price agreed on with Wingierski was (\$22) twenty-two dollars per bale, but Wingierski never paid the money, nor took possession of the tobacco, nor in any other way exercised right of property ; Wingierski told witness he had sold the tobacco at (\$24) twenty-four dollars per bale to Port ; soon after (witness thinks the same day) Port came to witness and told him he would take the tobacco at (\$24) twenty-four dollars per bale ; told Port he might have it ; Port paid eight thousand (\$8,000) dollars in cash, and the balance was passed to the credit of the United States, against Port, for supplies of clothing, &c., which he was then and is now furnishing for account of the United States ; the tobacco was the same now in controversy before the court ; witness thinks there could have been no dishonest collusions between Port and Wingierski ; has had many transactions with Port and always found him upright and honest in his dealings.

The testimony in the case being closed, the court proceeded to find the following, viz :

The board, finding no material contradiction in the statements of the different witnesses, deem it unnecessary any further to specify the facts proven than to decide that the testimony supports the substantial allegations of Domercq's petition.

They are of opinion that the (500) five hundred bales of tobacco sold by Captain Webster to Mr. Port were at the time of the said sale the property of Mr. Domercq, and not the property of the United States, and award the possession and ownership thereof to him, the said Domercq ; and that the quartermaster, Captain Webster, pay to Mr. Port eight thousand dollars, (\$8,000,) with interest from the date of its payment to him, and cancel the credit of four thousand dollars (\$4,000) to the United States in its accounts with Port for clothing, &c., supplied.

As to the repayment of the purchase money to Port, Major Young dissents on the following grounds, viz: Port sold the said tobacco to persons not parties to these proceedings, and who may have paid him, the said Port, for the same; that the quartermaster retain the purchase money until the question as to whom the money shall be paid, shall be decided by some competent authority.

There being no further business before the court, it then adjourned *sine die*.

E. DUMONT,
Lieutenant Colonel and President.

WM. P. YOUNG,
Major 4th V. V.

G. E. PUGH,
Captain 4th O. V.

S. W. WATERS,
First Lieutenant Cavalry and Recorder.

HEADQUARTERS MILITARY DEPARTMENT OF PUEBLA.

Puebla, September 12, 1847.

[Order No. 23.]

Captain Webster, acting quartermaster, will sell at auction some captured tobacco, and dispose of the proceeds as he will be hereafter directed.

THOMAS CHILDS,
Colonel Commanding.

Aviso â todos los que les puede interesar.

El capitan del 2d regimiento de artilleria W. C. de Hart, es teniente gobernador de la ciudad de Puebla, y el Sr. D. Alphonso de Wini-gierski, secretario.

THOMAS CHILDS,
Coronel y Gobernador civil y Militar.

I certify that I advertised the sale of tobacco on the 15th of October, for the 19th of October, by causing the notice of such sale, in Spanish and English, to be publicly fixed and placarded on the corners of the principal streets and thoroughfares of this city; and I further certify, that the following is a true copy of the original, in Spanish, and was taken from some public place after the sale of said article.

CHARLES R. WEBSTER,
Captain and acting quartermaster.

Aviso.

OBRE 16 DE 1847.

Se venderâ unos quinientos tercios de tabaco pava el 19 del presente en el caurtel de Sor. San Jose â las tres de la tarde en venta publica.

[Translation.]

On the 19th instant, there will be sold, at public auction, at three o'clock in the afternoon, at the cuartel San Jose, five hundred bales of tobacco.

ASSISTANT QUARTERMASTER'S OFFICE,
October 30, 1847.

SIR: You will please suspend the sale of the tobacco purchased of me for the present. You are perhaps aware that the whole is claimed by Senor Domercq.

Your obedient servant,

CHARLES R. WEBSTER,
Captain and acting quartermaster.

J. A. PORT, Esq.

QUARTERMASTER'S OFFICE,
Puebla, Mexico.

Received, Puebla, Mexico, November 29, 1847, of Captain Chas. R. Webster, assistant quartermaster, U. S. Army, twelve thousand dollars, delivered to him as proceeds of sale of captured tobacco, the said sale having been declared not valid.

J. ALEJO PORT.

PUEBLA, *November 29, 1847.*

Recevi del S. D. Alejo Port, lacantidad de diez y seis mil quinientos pesas valor de quinientos tercies tobaco qe me havia vendida a 33 ps. el tercio en 27 de Obre del anno de 1847.

[1,650 ps.]

T. ABADIE.

A.

PUEBLA, *October 29, 1847.*

GENERAL: On the 21st of May last, Quartermaster Captain Allen sold to Mr. L. S. Hargous 2,081 bales of tobacco, as seen in document No. 1; and on the 16th of June Mr. Hargous sold me the tobacco, as manifested by document No. 2; and on the 12th of June Capt. Allen gave me an order, No. 3, that I might receive, when I thought convenient, the 1,325 bales that were deposited in the warehouses of San Jose.

On the 5th of August, when the army of the United States marched for Mexico, and as a very small force was left in this city, I requested Mr. Hargous before leaving to present me to Col. Childs, that he might know me as the owner of the tobacco, and protect me in case that any attempt should be made on the part of the Mexican government. Col. Childs told Mr. Hargous that I might rely on his protection, and to which effect he gave me a safeguard, signed by the Commander-in-chief, that I might be enabled to apply for assistance at any of the posts occupied by the American troops. The governor asked me where the tobacco was deposited. I told him that a part

was in San Jose and the rest in different parts of this city. The deponent seeing the probability of a siege, removed 219 bales from the street of Herveros and other parts to a place that was under the fire of the American army, in the street of San Jose, No. 2, on the 9th of September. This house was inhabited by some American officers, next door to the baker's that supplied the American army with bread, thinking the tobacco would be secure from any attack. On the 23d September I received advice that the balcony and doors had been broken and forced open, and the Americans had taken possession of the 219 bales of tobacco by order of the governor. It was impossible for me to lay claim to the tobacco in the act, as hostilities had commenced; besides, trusting to the honor of the governor, who, in a case of emergency, made use of property that did not belong to him, he ought to be disposed to make me an indemnification for my loss. On the 13th of the present month, after the army commanded by you had entered the city, I presented myself to Col. Childs and informed him that the bales of tobacco had been used for fortifications and had been wet; that they were rendered perfectly unsalable, to which the governor answered by his secretary that he would order them to be taken care of. On the 14th I returned to lay claim for the damages that these bales had suffered, and the answer that I received was not very satisfactory. The same day I went to San Jose, and found the doors of the warehouse open in which the tobacco was deposited. I immediately returned to the house of the governor, and as I did not find him at home I requested the secretary to permit me to put a padlock on the door, and allow me to collect the bales that were in the yard that had served for fortifications. The secretary accompanied me immediately to San Jose and ordered the officer of the guard to put a sentinel at the door of the warehouse, and that he would inform the governor of the circumstance. The next day, 15th of this month, I again returned to the governor's house and told the secretary that I had come to put on the padlock, and requested him to give me an order to permit me to do so, when the secretary assured me it was useless; that the governor had given an order that the bales that were in the yard should be taken care of, and that the doors had been nailed up. I then went to San Jose and found that it was as he had stated. Being at rest on this point, I went to seek a proper place in the city in which I could deposit the bales; and having found one on the 19th instant I went to the house of the governor in order to inform him of my wish to remove the tobacco to another place; but what was my surprise when I saw bills posted at the different corners of the street advertising for sale the tobacco that was in San Jose. I immediately made a representation to the secretary, not being able to do so personally to the governor, as I am perfectly ignorant of the English language, telling him that I could not in any way permit the sale to take place, and presented to the secretary the documents which proved the tobacco to be my property, when the secretary answered that it was too late, and that all the tobacco had been sold by order of the governor; and that 700 bales had been bought by Mr. Weshe and 500 bales by a person that he did not know; but the governor would give me a certificate, signed al o by

the quartermaster, in which he would manifest that he had ordered the sale of the tobacco, in order to procure funds to supply the urgent necessities of the army; and that the amount of the certificate would be paid me in Mexico. I then said that I should like to see the governor immediately on the subject, when the secretary observed that it was impossible; that he would speak to him himself, and would be answerable of the result. I felt some consolation by these assurances of the secretary, but went to see him every day on the business, and on each visit received new promises.

At last, being convinced that the secretary only wished to gain time in order to make money on the tobacco, which he did on the sale of the 500 bales that were sold on the 20th to Don Alexo Port, on which sale he gained one thousand dollars. I therefore employed another person to speak to the governor on the subject, and ask him for the certificate which the secretary had promised me. This was on the morning of the 26th. The governor expressed to be greatly surprised, and said that he was ignorant of the whole affair. The governor having entirely forgot the promises which he made when I was presented to him by Mr. Hargous, he had also forgotten the claim which I made to him on the 13th and 14th of this month. It is natural to suppose that when I laid claim to the tobacco that I presented documents to support it, and the governor again repeated that he knew nothing relative to the business of which I spoke, but that I could receive the tobacco that still remained on hand. I then observed to the governor that I thought it just that the 500 bales which the quartermaster had sold to Don Alexo Port should also be returned, as this gentleman had only paid \$3,000 on account, when he told me that he had nothing to do with the business, and did not wish me to speak to him again on the subject, but that I could come to an understanding with the quartermaster. On seeing this gentleman he informed me that he could do nothing in the business, as he had sold the tobacco by order of Colonel Childs, but that I could make application to the general, which I now do in the most respectful manner, supplicating him that, having proved the facts here manifested, that he will order the 500 bales of tobacco sold to Port to be returned, as it is not just to suppose that the army of the United States would sell the same article twice and receive money for it; and according to the laws of trade the first sale is always valid. Neither is it just that I, the deponent, should lose the enormous quantity of 1,260 bales of tobacco, when at least the half of them had served as fortifications. Returning me the 500 bales that were sold to Don A. Port, there will remain 760 bales that were used as fortifications, and which have been sold to the soldiers of the army by permission of the governor; for these the deponent will be satisfied by receiving a certificate, manifesting that these have been taken for the use of said army of the United States.

The governor alleges that when he made use of said tobacco he believed it to be the property of the United States, as he had seen no document to prove that it had been sold. But the governor could have no motive to think that the tobacco belonged to the United States; but if the tobacco had actually been the property of the United States,

it is natural to suppose that Captain Allen, previous to his marching to Mexico, would have advised his successor of the circumstance; but, on the contrary, I was presented personally to the governor as the owner of the tobacco, and acknowledged as such. The governor also says that he had no knowledge of the documents which proved me to be the owner of the tobacco until the 26th; but the Governor should certainly suppose that when I laid claim to the tobacco on the 13th and 14th of the present month, that I should not have done so if I had not documents to prove that the tobacco was actually my *bona fide* property. It is also very strange to suppose that when I laid claim to property which the governor supposed to belong to the United States, that he did not ask by what right I laid claim to the tobacco. Besides, the governor must know that I am totally ignorant of the English language, and was therefore obliged to apply personally to his secretary, who should possess the unlimited confidence of the governor, particularly so, as the name of his secretary was affixed to various documents that were published by the governor. Consequently I cannot but think that the governor is morally responsible for the abuse of confidence placed in his secretary, more particularly as he was the person to whom every person who did not understand the English language were forced to apply, when they had any application to make to the governor.

Not wishing to intrude further on the time of the general, I make one more observation: that the governor, having considered it just that I should take possession of the bales of tobacco that were still remaining in San Jose, I also consider it just that the 500 bales that were sold to Don Alexo Port should also be returned to me.

I have the honor to be, general, your obedient and most humble servant,

BN. JUAN DOMERCQ.

Brigadier General T. LANE, &c., &c.

B.

On the 16th October, 1847, was advertised for sale by the quartermaster at St. Joseph, in the city of Puebla, Mexico, by the order of the governor of said city, a lot of 500 bales of tobacco on the 19th of said month, at public sale. Captain Charles B. Webster, quartermaster of said city, sold me the above 500 bales of tobacco at twenty-four dollars per bale, and delivered to me the same tobacco on the 21st, 22d, and 23d of the above mentioned month, of which I paid him the sum of twelve thousand dollars for the said tobacco.

J. A. Port, purchaser of said tobacco, sold the above-mentioned tobacco to Mr. John Abadie, on the 27th of October, 1847.

I received on the 30th of October, 1847, a letter from Quartermaster Charles B. Webster, informing me to suspend the sale of the said tobacco for the present; of which, on the receipt of the same, I answered to the quartermaster on the 31st of October, that I had sold the above-mentioned 500 bales of tobacco on the 27th of the same month.

The above mentioned tobacco that I purchased from Quartermaster Chas. B. Webster, was captured from the Mexican government by the Americans, which I can prove by these witnesses that are here present.

Please the President to let me remark to the court that when sales are made publicly, there are no sales more legal than them.

The person claiming the above mentioned tobacco was in this city at the time it was advertised for sale by the quartermaster of this city, and did not claim the same until some time after the sale was effected, and which proves that the said person claiming the tobacco offered to purchase the said tobacco after the sale had been effected, and it is natural that no one will buy his own property.

I hope that through the justice of the court, they will please take into consideration all of which exposé, as much for the revenues of the government, the rights, of the people, as the dignity of the acts of the representatives of the United States of America.

J. A. PORT.

PUEBLA, Mexico, *November 18, 1847.*

I do solemnly swear that all the above is the truth, and nothing but the truth.

P. S.—The Court will please excuse us if there are any errors.

P. S.—I furthermore state that no objection was made at the time of the sale, or before the sale, of the said 500 bales of tobacco by John Domercq, who lays claims to said tobacco.

J. A. PORT.

FORT MCHENRY, MARYLAND,
February 23, 1849.

SIR : I have the honor to acknowledge the receipt of your communication of the 22d instant, in relation to Mr. Port's claim for damages on account of a quantity of tobacco purchased by him for a Mr. Wingierski, at Puebla, in October or November, 1847.

In my opinion Mr. Port has no claim on the United States on account of this tobacco. His claim was carefully examined by an intelligent board of volunteer officers, lawyers by profession, and rejected. My evidence is given at large in their proceedings, and covers the whole ground, and I beg leave respectfully to refer you to those proceedings for the merits of the case.

Mr. Port appealed from the decision of the board to Major General Scott, and then to Major General Butler; the latter, I am told, after examining the evidence of the case, was satisfied that Mr. Port had no just claim on the United States.

I do not now recapitulate the facts in this case, as I have not the proceedings of the board to refer to. When I gave my testimony, all the particulars were fresh in my memory. Wingierski was my secretary and interpreter; he knew full well that the tobacco did not belong to the United States, for Domercq had told him so, and wished to see me on the subject, but was refused admission by Wingierski,

under the plea that I was engaged. Mr. Port must have known that this tobacco had been sold but a few months before; he must have known that all the tobacco in Puebla had been seized by General Worth, and publicly sold. It is not at all probable that one thousand or one thousand five hundred bales of tobacco could have been in Puebla in the possession of Mexicans and Mr. Port not know it, and he a tobacco dealer.

I have the honor to be, sir, your most obedient servant,
 THOMAS CHILDS,
Brevet Brigadier General United States Army.

Hon. the SECRETARY OF WAR.

HEADQUARTERS DEPARTMENT OF PUEBLA,
Puebla, February 23, 1848.

SIR: I received your communication of the 19th of January last only yesterday, together with Mr. Port's appeal to the general-in-chief, as to certain damages he has sustained by the fraudulent purchase of tobacco. I have only to observe, in answer to this appeal to the general-in-chief, in addition to my testimony before the court of inquiry, that the assertion of Mr. Port, that Mr. Hargous, on the 5th of August, presented to me as his agent, Mr. Domercq, that I might recognize him as the owner of the tobacco, and protect him in his rights over the same, etc.; that on the 5th of August I was not governor, neither did Mr. Hargous at that time, or any other time, present Mr. Domercq to me, to my recollection, and that my testimony before the court presents a true statement of all the circumstances, so far as I am concerned, in regard to this tobacco. I never gave the safeguard spoken of to my knowledge. As to the composition of the court being changed at my suggestion, it is false in every particular. I knew not who composed the court of inquiry until summoned before them to give my testimony. That I am even convinced that both my secretary and Mr. Port knew that this tobacco had been sold by Captain Allen, and that the fact was kept from me for fraudulent purposes, and finally hastened, in my opinion, the death of Mr. Wingerski, when he found out that the facts of the case had come to my knowledge from other sources; therefore, I do not consider Port entitled to damages. With these observations, I transcribe my testimony as given before the court of inquiry, and return the appeal to the general-in-chief.

"Colonel Thomas Childs, civil and military governor of the department of Puebla, being first sworn, was desired by the court to state all within his knowledge relative to the matter before the court, and answered as follows:

"The first knowledge witness had of any tobacco being in San José, was derived from information submitted to him by Captain Webster, depot quartermaster, some ten or fifteen days after the army had left for the city of Mexico; there was at that time, no money in the quartermaster's or any other department here. Supposing the tobacco to be

the property of the United States, witness directed the quartermaster to sell the same. In consequence of the position of affairs at the time, no purchaser could be found for a single pound. During the siege, his secretary and his interpreter, Mr. Wingierski, informed witness that a quantity of tobacco was deposited in a building one square beyond the position occupied by the Americans. Witness immediately ordered out a guard, seized the tobacco, and used it for fortifications along his chain of sentinels; the number of bales was 135, or 235, witness does not recollect which. The siege being raised, Mr. Domercq (witness thinks the day the siege was raised) called upon the witness at his office, and, through his secretary and interpreter, stated (as it was interpreted to witness) that Mr. Hargous was the agent for the tobacco; knowing that Mr. Hargous had been an agent for the United States, in many transactions, witness supposed him to be merely the agent for the government for the sale of tobacco captured by General Worth, and that this was the tobacco remaining on hand, and replied that it was all very right if Mr. Hargous was the agent; whereupon Mr. Domercq withdrew. Witness has reason to believe that the secretary and interpreter falsely interpreted the representations made on various occasions by Domercq, and that he took means to prevent Domercq from seeing witness by evasive answers; witness was not aware of any sale made by Domercq, but supposed the tobacco governmental property, until after it was advertised for sale, when a third party (a friend of Mr. Domercq) called on witness and exhibited bills of sale, which satisfied him that it was not government property. Witness immediately sent orders by the third party to stop the sale. He had been previously told by the secretary and interpreter, when he asked how it was that the tobacco was to be sold, that it was then too late; that the tobacco was advertised for sale, and that his remedy must be against the United States. It was after this that the third party "called on the witness and exhibited bills of sale. Witness is of opinion that the present claimant (Port) was in collusion with the secretary and interpreter in the tobacco purchase, and that both Port and the secretary and interpreter have been engaged in a nefarious attempt to speculate on the tobacco to the injury of the former purchaser, Domercq. His reason for this opinion is, that so large a quantity of tobacco could not have been sold in Puebla without the fact being known to all the tobacco dealers; the secretary and interpreter died subsequently to the sale made by the quartermaster; has every reason to believe that the secretary and interpreter were to receive two dollars (\$2) per bale from the last purchaser, (Port,) and has been informed that one thousand dollars (\$1,000) was due to the estate of Wingierski by Port, which witness has not yet collected, as he has been waiting the issue of the matter now pending before the court. Witness has no positive knowledge that Port was cognizant of the original sale; submits two papers from General Worth (doc. C and D) received by him since the last sale. Since the death of Wingierski many circumstances have come to the knowledge of witness which induce him to believe Wingierski to have been capable of almost any dishonest act; has discovered that on a

number of occasions false interpretations have been made of communications had between himself and other parties."

Cross-examined by claimant, Port.

Question. Did you not come to the quartel on the 23d of October, the day the delivery of the tobacco to me took place?

Answer. Does not recollect having been in the quartel since the siege was raised; never to his recollection saw Port before the present time; knew that the tobacco was in San Jose; never knew the particular building in which it was stored; had no control over it further than the orders given to the quartermaster, as already stated.

I have the honor to be, sir, your most obedient servant,

THOMAS CHILDS,

Colonel U. S. A., Commanding Department of Puebla.

Lieutenant Colonel E. A. HITCHCOCK,

Acting Inspector General, Head Quarters of the Army, Mexico.

CITY OF WASHINGTON, *February 25, 1849.*

SIR: I have the honor to acknowledge the receipt of your letter of the 22d instant, requesting me to report the circumstances connected with the claim of Mr. Port.

I have been unable to find the order of Governor Childs, or the advertisement of the sale of tobacco. My impression is that they were furnished to a court or board of officers, that convened at Puebla, Mexico, by order of General Lane, on the 17th day of November, 1847.

In accordance with the order of Governor Childs, I advertised the tobacco for sale by causing notices of the same to be affixed in the most public places of the city, in Spanish and English. On the day previous to the one on which it was advertised to be sold at auction, Mr. Wingierski, then secretary to the civil and military governor, Colonel Childs came to me and stated that he wished to purchase the tobacco and would give \$22 per bale for it. I declined, however, telling him that, if not offered more for it on the morrow, he could have it at that price. On the day of the sale, no purchaser appeared except Mr. Port, who offered me \$24 per bale, which I accepted. The money was paid by Mr. Port, and the tobacco (500 bales,) delivered to him.

Shortly after this sale, Mr. Domercq called on Colonel Childs with papers showing that he was the owner of the tobacco. Colonel Childs referred him to me, requesting me to examine into Domercq's claim, and, if satisfied that he was the owner of the tobacco, to call upon Mr. Port to re-deliver the tobacco to me, that I might put Mr. Domercq in possession. I wrote immediately to Port, who informed me that he had sold the tobacco to Mr. Jean Abadie.

Under these circumstances, and with the advice of General Lane and Colonel Childs, I endeavored to effect a compromise between the parties. Failing in this, I suggested to General Lane the propriety of calling a court to decide on the conflicting claims of the parties.

That court decided that Domercq was the rightful owner, and that

the tobacco should be re-delivered to him. That the quartermaster, Captain Webster, should pay back to Port the \$12,000, take the tobacco, and put Domercq in possession.

General Lane approved the proceedings, and ordered me to carry them into effect.

This is a brief statement of the fact as known to me.

I have the honor to be, with high respect,

Your obedient servant,

CHARLES R. WEBSTER.

Hon. W. L. MARCY,
Secretary of War.

HEADQUARTERS, ARMY OF MEXICO,
Mexico, March 7, 1848.

SIR: In the course of business, my attention has just been called to a complaint of S. P. Port & Co., made through the French minister at Washington, and forwarded by you, respecting a sale of tobacco, seized by Major General Worth at Puebla.

Colonel Childs the commander at that place, has been ordered to report direct to the War Department the nature and history of the case. I have refused, as did Major General Scott, to interfere with the decision of the court of inquiry in the matter, believing that the complainants have been allowed the fairest opportunity to substantiate their claims, if just.

In this connexion I beg leave to remark, that the fraudulent claims and attempts to recover Mexican property on pretext of neutral ownership, have been almost innumerable, and usually as baseless as they are boldly urged.

A copy of instructions to Colonel Childs on the subject is herewith enclosed.

I have the honor to remain, with high respect,

Your obedient servant,

W. O. BUTLER.

Hon. W. L. MARCY,
Secretary of War.

HEADQUARTERS, ARMY OF MEXICO,
Mexico, March 7, 1848.

SIR: I am directed to enclose you additional papers received here, respecting a tobacco case decided by Brigadier General Lane, in Puebla, November 20, 1847.

Other papers relating to the same case have been returned through you with the remark, that the decision made as above was final, as far as the military authority was concerned.

An appeal has been forwarded through the French minister at Washington and the War Department.

The details of the case are not well understood here; Major Gene-

ral Scott and Butler having successively refused to go into the case after the decision of the court of inquiry and the commanding officer at Puebla.

Major General Butler desires you, therefore, to report the history of the case directly to the War Department, keeping in reserve the documents necessary to its understanding, should they be called for. The records of the court of inquiry are believed to be among your archives; a copy of the finding and order in the case will, it is presumed, suffice for the War Department.

Very respectfully, your obedient servant,
GEORGE W. LAY,

Lieutenant and Acting Deputy Commissary.

Colonel CHILDS,
Commandant of Puebla.

HEADQUARTERS, DEPARTMENT PUEBLA,

Puebla, May 9, 1848.

[ORDERS No. 11.]

A board of officers, to consist of Major W. W. Morris, 4th artillery, Captain H. L. Kendrick, 2d artillery, and Captain C. S. Wight, Illinois volunteers, will assemble at the palace at 10 o'clock to-morrow for the purpose of inquiring into and reporting the facts connected with the seizure of a certain lot of tobacco claimed by Don Juan Domercq, a Spanish resident of this city.

The board, in addition to reporting the amount of tobacco lost or rendered useless in consequence of said seizure, is required to state what, in its opinion, would be a fair price for the quantity thus lost to the claimant, and if practicable it will ascertain the price contracted by the Mexican to be paid to the planters.

Captain Wight will record the proceedings of the board.

By order of Colonel Gorman :

O. F. WYNSHIP, *A. A. G.*

W. SPENCER, *A. A. G.*

The board met pursuant to the foregoing order : Present, Major W. W. Morris, 4th artillery, president; Captain H. L. Kendrick, 2d artillery, Captain C. S. Wight, 2d Illinois volunteers, recorder.

The board was unable to proceed to business in consequence of the absence of the claimant and his witnesses. The board therefore instructed the recorder to notify the former and summon the latter to appear before it on the succeeding day at 10 o'clock a. m.

The board then adjourned to meet to-morrow at 10 o'clock a. m.

Second day, May 11. The board met pursuant to adjournment. Present, Major W. W. Morris, 4th artillery, president; Captain H. L. Kendrick, 2d artillery, Captain C. S. Wight, 2d Illinois volunteers, recorder.

The proceedings of the board yesterday were read by the recorder and approved by the board, and the following order was read and recorded as a part of the order organizing the board :

"OFFICE OF THE CIVIL AND MILITARY GOVERNMENT,
"Puebla, Mexico, May 10, 1848.

"It is ordered that C. S. Wight, 2d Illinois volunteers, be, and he is hereby, authorized as recorder of a board of officers ordered and convened at the palace to inquire into and report upon the loss, and amount of damage arising therefrom, of a quantity of tobacco used by Colonel Childs for defence during the siege of Puebla, to administer all oaths necessary in the course of the investigation.

"Witness my hand and signature as civil and military governor of the State of Puebla.

"W. A. GORMAN,
"Colonel and Civil and Military Governor."

Attest:

D. SHADLER, *Secretary.*

The board then adjourned to hold its sessions at the quarters of the president.

Upon assembling, Señor Manuel Miranda, the Spanish vice consul resident in this city, and the attorney and agent for the claimant, Don Juan Domercq, was asked by the recorder if he had any objections either to the members of the board or the mode of investigation, and was interrogated by the president if he had any documentary evidence to exhibit which had not already been submitted to it. To all of which he replied in the negative. Whereupon, William Spencer was called and sworn as an interpreter, to well, truly, and faithfully interpret to the witnesses all questions propounded by the board, and the answers of the witnesses thereto.

Señor Joaquin Matemunto was then called, who, having previously been sworn on the cross by the recorder, through the interpreter, states to the board, in the Spanish language, which is translated to the board by the interpreter, as follows:

I was present when Mr. Hargous sold 2,081 bales of tobacco to Domercq. This was, I think, in June last, and at the Diligence hotel in this city.

I visited Colonel Childs frequently with Domercq in June, August, and November, 1847, in reference to a deficiency of 1325 bales of tobacco.

I was present when 219 bales of tobacco were stored in a house adjoining the quarters of Colonel Childs; this was between the 13th and 18th of August, 1847, near San Jose. Some time in October, I think about the 20th, Mr. Domercq and myself visited the house, and the windows had been broken open and the tobacco taken out. In August, 1847, I accompanied Mr. Domercq to the quartel and this city, and there deposited 1325 bales of tobacco for safe keeping, in the presence of several American officers. In November, 1847, Captain Webster, quartermaster of the United States army, delivered to me for Domercq 284 bales of the lot of tobacco deposited in the quartel in August, 1847. A short time afterwards Captain Webster, quartermaster United States army, delivered to me for Domercq 37 bales more of the same tobacco, and about the same time Colonel Childs sent me for Domercq two bales more. General Lane also de-

livered to me for Domercq 500 bales more, a short time after the fight at Tlascalala. During the latter part of October, 1847, I saw American soldiers selling tobacco of the same quality as that deposited in the quartel in August, 1847. At the time of the loss of 721 bales, Domercq was selling the same quality of tobacco at from \$6 to \$7 per *aroba*. I know this because I was present when sales were made. I have no pecuniary interest in the event of this investigation. I acted as the friend and not as the agent of Domercq in making the deposits of tobacco at the quartel. I know that the tobacco deposited in the quartel and in the house adjoining Colonel Childs's quarters was purchased by Domercq of Hargous in my presence, and I received it and brought a piece of it down to the quartel for safe keeping; 537 of the 2,081 bales of this tobacco were left in the church of Companier and other places in this city. I know that there were 219 bales in the house near Col. Childs's quarters in San Jose, and 1,325 bales in the quartel, because I was told so by those that counted it immediately after it was deposited.

Question by the board. Was Hargous the owner or the agent of the owner of the tobacco at the time of the sale of 2,081 bales to Domercq?

Answer. I do not know.

Question by the board. You have stated that 219 bales were deposited in the house adjoining the quarters of Colonel Childs; who had charge of the house and of the tobacco after it was deposited in it?

Answer. Domercq rented the house and had the keys of it.

Question by the board. Are you positive that the house in which the tobacco was stored was under lock and key?

Answer. Yes; I saw it locked up.

Question by the board. Was the quartel also under lock and key?

Answer. Yes; I saw it locked up.

Question by the board. Was the quartel occupied at that time; and if so, by whom?

Answer. It was occupied by American troops.

Question by the board. Was it occupied by American troops during the whole time the tobacco was stored in it?

Answer. Yes; it was all the time.

Question by the board. You have stated that 500 bales of tobacco were delivered to you for Domercq by General Lane; why did he do this, and what had he to do with the delivery of the tobacco?

Answer. He made the delivery; I know not what he had to do with it, or why he did so.

Question by the board. Was any of the lot of 2,081 bales of tobacco lost or destroyed, except that deposited in the quartel and in the house adjoining to Colonel Childs' quarters?

Answer. No; none.

Question by the board. Do you know anything about the tobacco previous to its coming into the possession of Mr. Hargous?

Answer. I do not.

Question by the board. What is the weight of a bale of tobacco; and do all bales weigh the same?

Answer. I do not know.

Question by the board. Are you sure that you visited Colonel Childs

with Domercq in June, 1847, in relation to a deficiency of 1,325 bales of tobacco?

Answer. I went to the quartel, but not for the purpose of seeing Colonel Childs, nor did I see him. In June, 1847, I deposited 1,544 bales of tobacco in the house adjoining Colonel Childs's quarters and in the quartel. I went to the quartel again in August to see if there was a deficiency in the amounts of tobacco I had deposited there, and ascertained that there was not. I went again in November and found a large deficiency.

Question by the board. You have stated that between the 13th and 18th of August, 1847, you deposited 1,544 bales of tobacco in and near San Jose; now you say it was in June, 1847. How do you explain this discrepancy in your testimony?

Answer. I may be mistaken both as to dates and months.

Question by the board. How long after you deposited the 1,325 in the quartel was it that you deposited the 219 bales in the house near San Jose?

Answer. I do not know.

Question by the board. Did you not mean at first that 1,325 bales were deposited in the quartel in June, 1847, and 219 bales in the house near San Jose in August, 1847?

Answer. Yes. I also desire that every statement of mine which does not correspond with this should be corrected, as it must have resulted from a misconception of my testimony.

[The board having no further interrogatories to put the witness was relinquished to Don Manuel Miranda, the agent for the claimant, who, having no questions to ask, the witness was dismissed from the stand, and Dr. SCHAELEER was called, who after being duly sworn, says:

When General Worth entered Puebla in May, 1847, he was informed that there was upwards of two thousand bales of tobacco in the city, belonging to the Mexican government. He immediately ordered it to be seized and sold. A short time afterwards, Captain Allen, of the Quartermaster's department, United States army, sold it at public auction, and Mr. Hargous became the purchaser. Mr. Hargous subsequently sold it or part of it to Don Juan Domercq. Mr. Domercq received 1,325 bales at the quartel, and the remainder in different parts of the city. A short time after the army left for the city of Mexico, Don J. Domercq removed 219 bales of this tobacco to house No. 6, in the 2d street of San Jose. About a fortnight after the siege, the Spanish consul came to me and requested me to accompany him to Colonel Childs for the purpose of establishing Domercq's title to the tobacco. Colonel Childs was very much astonished at my narration of the facts, and pronounced them very different from the representations that had been made to him by Mr. Wingierski, his secretary. Colonel Childs also stated to me that Mr. Wingierski had informed him that the lot of tobacco in No. 6 quartel was Mexican property, and that, confiding in the veracity of Wingierski's statement, he had accordingly ordered upwards of 200 bales to be sold by Captain Webster, quartermaster United States army. Colonel Childs at the same time desired me to accompany Mr. Domercq to Captain Webster, and say to him, in his name, to stop the sales of the tobacco, and to deliver all on hand to Mr. Domercq. This was on the 22d of October, 1847. The next

day Domercq received from Captain Webster, quartermaster United States army, 284 bales of tobacco. On the next day Domercq received 37 bales more from the same officer, and on the next day Colonel Childs sent Domercq 2 bales more. Colonel Childs also spoke to me in relation to 500 bales more which had been purchased by Mr. Wingierski at auction for \$22 per bale, and which he subsequently sold to a Mr. Port for \$24 per bale. Afterwards General Lane instructed Captain Webster, quartermaster United States army, to take eight men to Mr. Port's house, take possession of the 500 bales of tobacco, and deliver it to Domercq, all of which was done. Tobacco of the quality lost by Domercq was worth, just before the siege, from \$6 to \$6 50 per *aroba*; an *aroba* is 25 pounds, more or less.

Bales of tobacco were used by Col. Childs in fortifying the quartel, constructing parapets upon the house-tops, and barricading the streets. American soldiers sold tobacco in the streets of this city after the siege. I saw many bales of tobacco in the yard of the quartel a few days after the siege, exposed to the action of the elements. This was during the rainy season.

Mr. Miranda, Domercq's attorney, having no questions to propound, the board adjourned until to-morrow at 10 o'clock a. m.

THIRD DAY, *May 12.*

The board met pursuant to adjournment. Present, Major W. W. Morris, 4th artillery, president; Captain H. L. Kendrick, 2d artillery; Captain C. S. Wight, 2d Illinois volunteers, recorder.

The proceedings of yesterday were read by the recorder, and approved by the board.

Señor CASTO BRESTOR, having first been duly sworn upon the cross, says as follows, through the sworn interpreter, Mr. Spencer:

Mr. Hargous told Domercq early in June, at the time of the sale of the tobacco to him, that 1,325 bales of it were in the quartel in this city, and that the remainder of the tobacco was in the church of San Augustine; two hundred and nineteen bales of tobacco stored in the church of San Augustine were removed to No. 6, 2d street, of San Jose, near Col. Childs's quarters, on the day that General Twiggs left Puebla for the city of Mexico. I received this lot of tobacco myself, and deposited it in the house No. 6.

Shortly after the siege, I accompanied Domercq to the quartel, and found but 284 of the 1,325 bales of tobacco that had been deposited there. Domercq received the 284 bales at that time, and afterwards stored it in the church of Companier. A few days afterwards, Domercq received thirty-seven bales of Captain Webster, and two of Col. Childs; and early in November, Domercq received five hundred bales of Gen. Lane, which had been sold to Port; which still left a deficiency of seven hundred and twenty-one bales. I have no interest in the event of this suit. Domercq told me in 1837, that he was born in Spain, of French parentage. Tobacco of the same quality as that lost by Domercq was selling before the siege for from \$6 to \$7 per *aroba*. Domercq resides in the city of Mexico; house No. 6, 2d street of San Jose, was locked up after the tobacco was deposited in it, and

Domercq had the key. In the latter part of October, I accompanied Domercq to No. 6, San Jose, and found the door broken open and the tobacco taken out.

Neither the board nor the claimant, through his agent, Mr. Miranda, having any further interrogations to put to the witness, he was dismissed from the stand, and Señor FRANCISCO MUNOZ was called, who, having been previously sworn on the cross, testifies through their sworn interpreter, Mr. Spencer, as follows :

I know nothing of the loss of the tobacco, except from the representations of Domercq to me. I believe Domercq to be a Spanish citizen, because I have seen letters from his family in Spain. I do not know the price stipulated to be paid by the Mexican government to the planters.

Question by the board. What was tobacco selling for before the siege, in this city ?

Answer. For from \$6 to \$7 per *aroba*.

Question by the board. What is the average number of *arobas* to the bale ?

Answer. Eight.

JOHN DE OLMA was then called, and having been sworn upon the cross, testifies as follows, through the sworn interpreter of the board:

Early in June, 1847, I saw Hargous deliver to Domercq, at the quartel, what he represented to be 1,325 bales of tobacco. In August, 1847, I saw Domercq deposit a large number of bales of tobacco in No. 6, 2d street of San Jose. Señors Brisbe and Nuierta were also present at the time. As soon as the tobacco was deposited, Domercq locked up the house, and took possession of the keys. I know Domercq to be a Spanish citizen, because I have seen his passports, as also his letter of protection of the date of 1847. I do not know what is the price the Mexican government contracted to pay the planters for tobacco.

Neither the claimant nor the board having any other interrogatories to propound, the witness was dismissed, and Mr. WILLIAM SPENCER, the interpreter for the board, after being duly sworn, says :

I have been the agent and interpreter of Captain Webster, quartermaster United States army, since the 1st of August, 1847. After the siege commenced, I was ordered by Col. Childs to break open the doors of the quartel and house No. 6, 2d street of San Jose, and to use the tobacco in them in constructing breastworks, &c., for the defence of the American troops. All the bales in both houses were turned out, and used during the siege in fortifying the house-tops and barricading the streets. This was during the rainy season, and some ten bales were destroyed and spoiled by exposure to the sun and rain. When the siege was over, the tobacco was again deposited in the quartel. I put locks on the doors of the quartel at three different times, and the doors were as often broken open and tobacco taken out, and American soldiers were frequently confined in the guard-house under charges for stealing it. There must have been at least two hundred bales stolen out of the quartel after it was deposited there the

second time, and there were at least twenty bales spoiled by the weather and given to the American troops during the siege. After the siege, Col. Childs instructed Captain Webster to advertise the tobacco stored in the quartel for sale, and I wrote the advertisements and had them put upon the corners of the streets. Five hundred bales of the tobacco was sold to Wingierski, at \$22 per bale; and Wingierski shortly afterwards sold it to Port at \$24 per bale. I delivered the five hundred bales to Port on the 22d of October, 1847, by order of Captain Webster. On the 23d day of October, 1847, Colonel Childs ordered the sale of the tobacco to be stopped; and on the 25th October, 1847, I was ordered by Col. Childs, through Captain Webster, to deliver to Mr. Domercq the remainder of the tobacco on hand. I accordingly delivered to Mr. Domercq two hundred and eighty-four bales at one time, and thirty-seven more at another time, and I had official information that two other bales were also delivered to Domercq by Col. Childs. In November, 1847, I went with a detachment of men to Port's house, under order from Gen. Lane, and, upon being refused the keys, burst open the door and took the five hundred bales of tobacco sold by Wingierski to Port, and delivered it to Domercq. The bales in the quartel contained in equal proportions three different qualities of tobacco, and was worth about the 1st August, 1847, \$6 per *aroba* of 25 pounds. I heard Wengierski tell Col. Childs that the tobacco in the quartel and house No. 6, 2d street of San Jose, and Mexican property, and it was in consequence of this information that it was afterwards seized by order of Col. Childs. The men I sent down to remove the tobacco from the Calle de San Jose, shortly afterwards returned for an axe to burst open the door. Eight *arobas* to the bale was the average of the bales deposited in the quartel.

Neither the board nor Mr. Mirandi, the agent for Domercq, having any further questions to ask the witness, he was dismissed from the stand.

Mr. MIRANDA was then duly sworn upon the cross by the recorder, through the interpreter, and the following questions propounded by the board and answered by the witness through the sworn interpreter of the board, Mr. W. Spencer:

Question by the board. Do you know the price stipulated by the Mexican government to be paid to the planters for tobacco? If so state it.

Answer. I do not know.

The witness having nothing further to say, and the board having no other questions to ask, the witness was dismissed.

The board then asked Mr. Domercq's agent, Mr. Miranda, if he had any other witness to produce, or any additional documentary testimony to submit; and upon his answering in the negative, the board adjourned until 10 o'clock to-morrow.

FOURTH DAY, May 13.

The board met pursuant to adjournment. Present, Major W. W. Morris, 4th artillery, president; Captain H. L. Kendrick, 2d artillery; Captain C. S. Wight, 2d Illinois volunteers, recorder.

The proceedings of yesterday read by the recorder, and approved by the board.

There being no additional testimony to be adduced, the board, after a distinct recollection of the testimony, find the following facts :

When General Worth entered Puebla, in May, 1847, he seized and caused to be sold upwards of 2,000 bales of tobacco, owned by the Mexican government. Hargous became the purchaser, and subsequently sold 2,081 bales of it to Don Juan Domercq, a Spanish citizen. He delivered 1,325 bales at the Cuartel San José, and the remainder in different parts of the city. Domercq removed 219 bales of the tobacco deposited in the church of San Augustine to house No. 6, calle de San Jose, for safe keeping, on the day General Twiggs left Puebla for the city of Mexico. During the siege, at Col. Childs's order, he believing the tobacco to be Mexican property, all the tobacco was taken out of the Cuartel San Jose, and No. 6, 2d calle de San Jose, and used in constructing breastworks and barricades for the defence of the American troops; in consequence of which, twenty bales were destroyed by exposure to the elements, and presented to the soldiers by Col. Childs's order, and two hundred bales were afterwards stolen from the Cuartel. In October and November, 1847, 823 bales of tobacco were restored to Don Juan Domercq by order of Col. Childs and Gen. Lane. The board could not ascertain either from the oral or documentary evidence exhibited to it what price the Mexican government contracted to pay the planters for tobacco. The board also find that eight *arobas* constitute a bale of tobacco, and that tobacco of the same quality as that lost by Domercq was worth, about the 1st of August, 1847, \$6 per *aroba* or twenty-five pounds. The board is therefore of the opinion, after a mature deliberation of the facts above established, that Don Juan Domercq is justly entitled from the United States, to the value of 721 bales of tobacco, being \$34,608; with legal interest thereon from the 1st November, 1847, until paid.

W. W. MORRIS,

Major United States Army, President.

H. L. KENDRICK,

Captain second artillery.

C. S. WIGHT,

Capt. 2d Illinois volunteers, recorder of the board.

[Endorsed.]

HEADQUARTERS, ARMY OF MEXICO,
Mexico, May 20, 1848.

Don Juan Domercq, a Spaniard, having claimed indemnity for losses sustained at the hands of the American army, by the seizure as Mexican property, of tobacco which he had acquired by purchase from the quartermaster's department, I thought it proper, for the information of the government, to order a board of officers to investigate and report upon the facts. This report is transmitted to the War Depart-

ment, whose decision is requested in the case, as I do not myself feel authorized to order the payment recommended by the board.

W. O. BUTLER, *Maj. Gen. Com'g.*

WAR DEPARTMENT,
Washington, March 1, 1849.

SIR: In relation to the claim of Mr. A. Port, which forms the subject of your letter of the 8th ultimo, and of the note of the minister of France therewith enclosed, I have the honor to transmit herewith, reports from General Childs and Captain C. R. Webster, who are acquainted with the circumstances under which the claim originated, together with other papers containing information upon the subject.

It will be seen that the claim of Mr. Port was submitted to the consideration of a board of officers, in Mexico, who decided that it was without merit.

The proceedings of this board, and the testimony taken, appear to have been transmitted to the United States; but, after diligent search, I regret that they cannot now be found, nor indeed, does it appear that they reached this department. Further efforts will be made to recover them.

The letter of Major General Butler, of March 7, 1848, and the paper transmitted by him, under the date of May 20, 1848, herewith enclosed, do not directly relate to this claim, but to others connected with it.

Very respectfully, your obedient servant,

W. L. MARCY, *Secretary of War.*

Hon. JAMES BUCHANAN,
Secretary of State.

HEADQUARTERS OF THE U. S. ARMY OF MEXICO,
City of Mexico, April 18, 1848.

SIR: The general commanding has the honor, to acknowledge the receipt of your communication of the 15th inst., with the accompanying documents relative to the "tobacco case" of Senor A. Port, a French citizen. I am instructed to say to you, that this matter was some time since brought before a "court of inquiry," whose decision Major General Scott, then commanding, considered final; thinking this method of settling questions by litigation, in the absence of a civil jurisdiction, the most just and satisfactory that could be resorted to, under our military occupation.

This conclusion has been fully sustained by the present general commanding.

That Mr. Port and others, might not be debarred from the privilege of a higher authority, Colonel Childs, commanding at Puebla, has been ordered to report to the War Department the nature and history of the case; and since an appeal has been made by Senor A. Port, through

the French minister at Washington, any further action in this case will come directly before the government there.

I return the documents of the party, with the instructions of the general commanding, that papers relating to this case must necessarily in future be forwarded direct to the Department; and his Excellency the French minister at Washington.

With high esteem, I am, sir, your obedient servant,

J. RUSSELL BUTLER,
Lt. & A. D. C.

His Excellency BARON SOUSY DU BESLAN,
Chargé de Affaires, &c.

I certify the foregoing to be a true copy of the original, shown to me and identified with this by my signature. Office of civil and military Governor, city of Mexico, *May 18, 1848.*

PERSIFER F. SMITH,
Bvt. Brig. Gen. & Gov.

Vouchers for the case of Mr. A. Port, relative to the affair of the tobacco, sold in Puebla by the Governor, Colonel Childs, on the 19th October, 1847.

HEADQUARTERS, MILITARY DEPARTMENT,

[Orders No. 55.]

Puebla, May 20, 1847.

3. A quantity of tobacco, the property of the Mexican government, has been seized, confiscated, and is hereby ordered to be sold to the highest bidder. The chief quartermaster, Captain Allen, will receive written proposals until 5 o'clock p. m. of to-morrow, 21st inst., each proposal naming the quantity to be purchased.

4. From the proceeds of sales of tobacco, the property of the government of Mexico, seized, confiscated and ordered to be sold in this city, the chief quartermaster will set off three thousand dollars to the appropriation for the procurement of necessaries and comforts of the sick, and three thousand dollars for the procurement of vegetables (not included in the government rations) for the troops, both amounts to be turned over to the chief commissary. The funds to be expended on requisitions of the chief surgeons and by the chief commissary. The balance of the money will be carried to the credit of the Treasury of the United States of America.

By order of Major General Worth:

W. W. MAIKAN,
A. A. General.

ASSISTANT QUARTERMASTER'S OFFICE,

Puebla, Mexico, May 25, 1847.

I certify that I have this day sold to L. S. Hargous, esqr. 2,061 bales of tobacco, by order of General Worth, under whose order the seizure was made from the Mexican government.

R. H. ALLEN,
Captain and A. Q. M.

PUEBLA, *June 12, 1847.*

The bearer, Mr. Domercq, has purchased the tobacco in store at San Jose, and has promised to enter and remove the same at pleasure.

R. H. ALLEN,
Captain and A. Q. M.

Hevendido al Senor D. B. Juan Domercq, dosmil ochenta gren tercio d tabaco, cuyo importe de cuaventa gunmuil suscientos veinteperos, me ha pagado en letras sobre de Megico, a cargo de D. F. Marañón.

PUEBLA, *Junio 6, de 1847.*

Y. S. HARGOUS.

ASSISTANT QUARTERMASTER'S OFFICE,
November 10, 1847.

I certify that on the 21st of October I sold per order of Governor Childs, 500 bales of tobacco at 24 dollars per bale.

CHAS. R. WEBSTER, *Captain and A. Q. M.*

CITY OF MEXICO, *November 1, 1847.*

MY DEAR CHILDS: A few days after my command reached and occupied Puebla, I caused to be seized a large quantity of tobacco, the property of the government of Mexico, confiscated the same, and ordered it for sale. It was sold by Quartermaster Allen, who reported to me the terms of sale, to Mr. Hargous, which I approved.

I now learn, that by your order the tobacco has been taken out of the hands of Hargous's agent and resold. If so, whatever may have been your necessities in the way of funds for public purposes, a decided wrong has been done to the purchaser. I enclose a copy of my order of the proceeds.

I am truly yours,
COL. CHILDS, *Governor of Puebla.*

W. J. WORTH.

HEADQUARTER'S, DEPARTMENT OF PUEBLA,
[Orders No. 130.] *Puebla, November 22, 1847.*

The General commanding directs that Captain Webster, Mr. Port, Mr. Abadie, and Messrs. Gambin & Co., and Mr. Gordon Mancy, report themselves at headquarters at 3 o'clock p. m., for the purpose of settling finally the business referring to a lot of tobacco in dispute.

By order of General Lane:

S. DOUGLAS,
1st Lieutenant.

ASSISTANT QUARTERMASTER'S OFFICE,
November 30, 1847.

SIR: Mr. Domercq informs me that the last buyer of the tobacco refuses to give up the key. Will you send an officer with a file of men to see that he has possession of what the court has decided is his property, and put him in quiet possession of the same without any disturbance? My interpreter goes with Mr. Domercq.

I am, sir, your obedient servant,

General LANE.

CHARLES R. WEBSTER,
Captain & A. Q. M.

HEADQUARTERS, DEPARTMENT PUEBLA,

[Orders No. 174.]

Puebla, December 7, 1847.

1. All persons, who have instituted legal proceedings against Alejo Port, or against any other person or persons, for and concerning certain tobacco, purchased by said Port of the depot quartermaster of Puebla, Captain Charles Webster, at public places, are hereby strictly enjoined from all further proceedings in the premises, in any court or courts of this country at their peril.

2. All persons holding writings, contracts, receipts, bills of sale or other paper or papers, conflicting with or adverse to the latter order issued from these headquarters, nullifying all such contracts, bills of sale, or other paper or papers, or transfers, are hereby ordered forthwith to deliver such contracts, transfers, bills of sale, or other papers to Lieutenant Alexander Hayes, quartermaster of this brigade.

By Order of General Lane:

T. J. WHIPPLE,

Aid-de-camp and A. A. A. General.

FLAG OF FREEDOM, Puebla, (Mexico) Wednesday, October 20, 1847:

[Extract].

HEADQUARTERS, MILITARY DEPARTMENT OF PUEBLA,

Puebla, 12th October, 1847.

To my staff, Lieutenant Waelder, A. A. A. General, and my secretary, Mr. Wingierski, I am indebted for most valuable services. They were not only employed in their official duties, but commanding troops, and by day and by night were most active and zealous. I cannot sufficiently thank these gentlemen for their services.

THOMAS CHILDS,

*Colonel U. S. A., civil and military Governor.*Capt. H. L. SCOTT, *A. A. A. General,**Headquarters of the army, Mexico.*

FLAG OF FREEDOM, Puebla, (Mexico) Saturday, January 15, 1848

[Extract].

HEADQUARTERS, MILITARY DEPARTMENT OF PUEBLA,

Puebla, 13th October, 1847.

I have now only to speak of my A. A. A. General, Mr. Waelder, of the 1st Pennsylvania volunteers, and my secretary Mr. Wingierski.

The gallant charge of Lieutenant Waelder upon the enemy, although rash, exhibits him as an officer not to be intimidated by numbers. His duties have been arduous and dangerous, having daily to

carry orders through the thickest of the fire. I take great pleasure in recommending him to the favorable notice of the General-in-chief.

To Mr. Wingierski, secretary and translator, I am much indebted for valuable services. Mr. Wingierski, in addition to his appropriate duties, conducted the operation of the spy company, and through his suggestions and active exertions I received much valuable information, and many successful expeditions of spies into the city were made. Mr. Wingierski commanded the detachment on the roof of my quarters, and was the first man wounded. From his after efforts, his wounds proved severe and painful; still he performed his various duties night and day, and is worthy of my approbation.

THOMAS CHILDS,

Colonel, U. S. A., civil and military Governor.

To Capt. H. L. Scott, *A. A. A. General,*
Headquarters of the army, Mexico.

PUEBLA, December 14, 1847.

SIR: I am instructed by General Lane to recommend to the General-in-chief, Mr. Alexander Port, a Frenchman, and resident of this city; he has been very useful to the troops at this place, in procuring clothing, forage, &c., and has ever proved a firm friend to the Americans. Private business requiring his presence in Mexico, General Lane, deems it his duty, to recommend him to the notice of the General-in-chief.

I am, very respectfully, your obedient servant,

THOMAS J. WHIPPLE,

To Capt. H. L. Scott,
A. A. A. General.

VICE CONSOLADO DE ESPAÑA,
en Puebla.

Habiendome impuesto de la a tentada nota de V. S. 11. del actual relatiba á la cantidad de tabaco de que ha sido derrojado el Subdite Frances D. S. A. Port, quién exise la documentos que precento al General-en-Gefe de la tropas Norte Americanos (y este há remitido) para la reclamacion caitra el Gobernador militar de esta ciudad, las euales V. S. ine idica estar en esta commandancia militar: me hé apersonado en consecuencia á la Secretaria de dpa. Gobierno, y se me há manifestado que tales documentos no existen allá, y que en el caso de haberlos recibido, obrarán en poder del Sr. De Tomas Childs, Gobernador civil y militar, que hoy se halla en esa Capital, de consiguiente espero el regreso de esa autoridad, para reclamarlas meramente, danod aviso enmediatamente á esa Legacion de los resultados que obtenga.

Aprovecho esta ocasion para reiterar a V. S. los seguridades de mi conderacion, y ruego a Dios ouarde a V. S. ms. ans. Puebla, Marza 16, de 1848.

MANUEL MIRANDA Y SEPTION.

Sor. D. Bamon Lasano y Armentos Secretario dela Legacion de S. M. C. y encargado interino de negocios en Megico.

I certify that the foregoing documents have been compared by me with others identified by my signatures of this date, and are found to be correct copies.

CITY OF MEXICO, *Office of Civil and Military Governor, May 18, 1848.*

PERSIFER F. SMITH,
Bvt. Brigadier General and Governor.

IN THE COURT OF CLAIMS.

J. ALEXIS PORT, *vs.* THE UNITED STATES.

Petitioner's brief.

J. Alexis Port is a French citizen, and he has resided in the city of Puebla, as a merchant of reputable and unblemished character, for more than fourteen years.

While the United States army was in possession of the said city of Puebla, in pursuance of the order of Colonel Thomas Childs, then acting as civil governor of Puebla, Captain Charles R. Webster, United States army, and acting quartermaster, advertised for sale at public auction 500 bales of tobacco. The following is the statement of Captain Webster, with a copy of the advertisement:

"I certify that I advertised the sale of tobacco on the 16th October, for the 19th October, by causing the notes (notices) of such sale, in Spanish and English, to be publicly fixed and placed on the corners of the principal streets and thoroughfares of this city; and I further certify that the following is a true copy of the original in Spanish, and was taken from some public place after the sale of said article."

CHAS. R. WEBSTER,
Cap. and A. Q. Master.

The following is the translation of the advertisement:

"On the 19th inst., there will be sold at public auction, at 3 o'clock in the afternoon, at the quartel San Jose, 500 bales of tobacco."

Port became the purchaser of said tobacco at \$24 per bale, amounting to the sum of \$12,000; and paid for the same the sum of \$8,000 in cash, and by a credit to the United States in account with him the sum of \$4,000; the United States being at the time indebted to him for supplies furnished the army.

The following is the certificate of Captain Webster:

"I certify, that on the 21st of October, I sold, per order of Governor Childs, 500 bales of tobacco, at \$24 per bale.

"CHAS. R. WEBSTER,
Capt. and A. Q. M.

"NOVEMBER 10, 1847, *Ac. Q. M. Office.*"

The petitioner, on the 27th of the same month of October, sold the said tobacco to Señor Don Juan Abadie, merchant of said city, at \$33 per bale, amounting in all to 16,500 dollars.

On the 13th November, 1847, Señor Abadie sold the same tobacco to Messrs. Gamio & Co., of the city of Mexico, for \$35 per bale, amounting to \$17,500, accompanied with a warranty that the tobacco was his legitimate property, and that he would present the proper documents and certificates of the American authorities, so that the sale might have no obstruction, and the property might be removed at pleasure without any impediment whatever, and that the seller should be responsible to close up any difficulty which might arise.

And on the 15th November Messrs. Gordon & Murray purchased this tobacco at \$48 per bale of 214 pounds, amounting to \$21,000, for which they paid in cash, and the seller warranted the sale against any difficulties which might arise.

The petitioner, after the sale by him of the tobacco purchased as aforesaid, was informed that the tobacco was claimed by a merchant of Puebla, of the name of Domercq, and on the 1st November, 1847, General Worth addressed a letter to Colonel Childs, on this subject, in which he remarks: "I now learn that by your order the tobacco has been taken out of the hands of Hargous's agent and resold. If so, whatever may have been your necessities, in the way of funds for public purposes, a decided wrong has been done to the purchaser," &c.

On 17th November, 1847, by order of General Lane, a board of inquiry, consisting of four officers of the army, was convened at Puebla for the purpose of examining into the matters. They had before them a communication from Mr. Domercq and the petitioner, and examined as witnesses Colonel Childs and Captain Webster. The majority of the board declare that "they are of opinion that the 500 bales of tobacco sold by Captain Webster to Mr. Port were not at the time of the said sale the property of the United States, and award the possession and ownership thereof to him the said Domercq, and that the quartermaster, Captain Webster, pay to Mr. Port \$8,000, with interest from the date of its payment to him, and cancel the credit of \$4,000 to the United States in its account with Port for clothing, &c., supplied."

On the 30th of said November, Captain Webster addressed a letter to General Lane, stating that Mr. Domercq informed him that the last buyer of the tobacco refused to give up the key, and requested that he would send an officer with a file of men to see that he has possession of what the court had decided was his property, and put him in quiet possession of the same without any disturbance; and in pursuance of this request the tobacco was forcibly seized and delivered to Mr. Domercq.

It is not contended, that, at the time of the several sales and transfers of the tobacco as aforesaid, the price at which the tobacco was sold was above the fair market price at the time in the city of Puebla, nor that it was not worth, when seized by the order of General Lane, at least the sum claimed by Messrs. Gordon & Murray, the last purchasers.

It appears from the statement of Mr. Domercq himself, that after the purchase of the tobacco by the petitioner, and before the sale by him, he offered to the petitioner to purchase it at \$31 or \$32 per bale; and General Lane, in an order confirming the doings of the board of inquiry, directs—

“3. That the quartermaster, Capt. Webster, cancel the credit of \$4,000 now at the credit of the United States against Port on his books.

“That the quartermaster, Capt. Webster, retain the sum of \$8,000 paid by him to Port until evidence to his satisfaction shall have been furnished that all the purchasers subsequent to Port shall have been refunded the amount respectively paid by them in the sale and resale of said tobacco.

“5. It is made the special duty of the quartermaster, Capt. Webster, to give immediate notice to parties interested, and to see this order carried into effect.”

In view of the foregoing facts the petitioner claims that he is entitled to compensation from the United States for the damages which he has sustained by the acts of their own officers; that as he has been subjected to the necessity of making full compensation to the subsequent purchasers for the losses sustained by them successively, as well as to the direct injury arising from annulling the contract of sale, that for such loss and damage he should be fully indemnified; and as it is understood to be the practice in demanding of other nations redress for injuries to its citizens and is just in itself, that interest be allowed, and such further damages as he has actually sustained.

It is also claimed that the title acquired by him was a valid title, and would be sustained before any court acting under the law of nations; that the seizure and sale of the property of an individual domiciled in Mexico during the war with that nation would vest the property in the purchaser; that it was not the duty nor the right of your petitioner to sit in judgment upon the acts of the commander of the American forces, nor to determine to what extent he should exercise the acknowledged rights of a belligerent; that the question as to the degree of mildness or severity with which the war should be prosecuted was a national question, and that the petitioner was authorized to purchase property publicly offered for sale by the commander of the American forces, whether the same had been seized by him as the property of the nation or of individuals.

If the former owner of the tobacco in question, Mr. Domercq, should have instituted a suit before the courts of the United States against the petitioner for the value of the tobacco on the ground that the seizure and sale had been illegal and void, upon no principle could the claim be sustained, and still less is it consistent with justice and good faith for a nation thus to annul without just compensation its own contracts.

It is apparent, too, that the same view was entertained by all parties at the time the sale was made. Even the former owner of the tobacco himself regarded the title of your petitioner as valid,

and proposed to purchase of him the tobacco which he had formerly owned.

From all the proofs in this case it is perfectly apparent that the sale was made publicly in open market, and that the purchase was made in entire good faith; that the purchase-money was paid and the article delivered, and that the contract has been rescinded without any fault on the part of the petitioner.

As there is not the slightest proof of any kind or ground for suspicion of any unfairness on the part of the petitioner, he might safely rest his case on the facts above stated, which are proved undeniably by the evidence in this case.

But Col. Thomas Childs, U. S. A., and then governor of Puebla, in his testimony before the board of officers, gratuitously and unjustly assailed the reputation of the petitioner; and by the expression of a suspicion of fraudulent collusion between the petitioner and his own secretary, has not only greatly prejudiced the claim of the petitioner for redress for the breach of contract, but has assailed his reputation, and among those to whom he was unknown has injured his character for integrity, never before questioned.

The imputation, based merely on suspicion, is not only made without proof, but the proof shows it to be wholly unfounded.

Col. Childs says: "Witness is of opinion that the present claimant, Port, was in collusion with the secretary and interpreter in the tobacco purchase, and both Port and secretary and interpreter had been employed in an infamous attempt to speculate on the tobacco to the injury of the former purchaser, Domercq. His reason for this opinion is, that so large a quantity of tobacco could not have been sold in Puebla without the fact being known to all the tobacco dealers. The secretary and interpreter died subsequently to the sale made by the quartermaster. Has every reason to believe that the secretary and interpreter were to receive two dollars per bale from the last purchaser (Port,) and has been informed that \$1,000 was due to the estate of Wingierski by Port, which witness has not yet collected, as he has been waiting the issue of the matter now pending before the court; witness has no positive knowledge that Port was cognizant of the original sale."

Never were such serious charges before made without the pretence of any proof.

The only ground for this opinion is, that "so large a quantity of tobacco could not have been sold at Puebla without the fact being known to all the tobacco dealers."

In the first place, it is proved by a number of witnesses that, at the time and before and after that sale was made to Domercq, the petitioner was absent from Puebla. In the next place, his business was not that of a tobacco dealer. But we respectfully but confidently contend, that it is entirely immaterial whether he did or did not learn that this tobacco was the property of Domercq at the time it was seized by the officers of the United States. It appears from the statement of Col. Childs himself, that "at that time there was no money in the quartermaster or any other department; and Gen. Worth, in his letter of the 1st November to Col. Childs, understood that the prop-

erty had been seized for the purpose of supplying the necessary funds. He says: "Whatever may have been your necessities in the way of funds, a decided wrong has been done to the purchaser," &c.

Doubtless Colonel Childs considered that the necessity of the case justified him in seizing and selling private property in order to supply the necessary funds.

Certain it is that the United States publicly and forcibly did seize the private property of Domercq, and after due notice, publicly sold it. Whether this act of seizure and sale of the property of an individual is justified by the circumstances, is not important. It surely is a strange charge to make by the officer seizing and selling the goods, that the purchaser, if he knew who the former owner had been, would be guilty of fraud.

But Colonel Childs charges his secretary and interpreter with fraudulently and falsely interpreting the communications from Mr. Domercq to him. It is no part of our duty to vindicate the character of this person, who at the time when the charges were made was deceased; but it is proper to observe that Colonel Childs, in a communication to Capt. Scott, a. a. a. gen., of the 12th of October, 1847, published in the "Flag of Freedom" of the 20th of October, the very time of these transactions, says: "To my staff, Lieutenant Waelder, a. a. gen., and my secretary, Mr. Wingierski, I am indebted for most valuable services. They were not only employed in their official duties, but commanding troops, and by day and night were most active and zealous. I cannot sufficiently thank those gentlemen for their services." And on the 13th of October, 1847, in another communication addressed to the same officer, published in the "Flag of Freedom" of 15th of January, 1848, he says: "To Mr. Wingierski, secretary and translator, I am much indebted for valuable services. Mr. W., in addition to his appropriate duties, conducted the operations of the spy company; and through his suggestions and active exertions I received much valuable information, and many successful expeditions of spies into the city were made. Mr. W. conducted the detachment on the roof of my quarters, and was the first man wounded. From his after efforts his wound proved severe and painful; still he performed his various duties night and day, and is worthy of my approbation."

The reasons of Colonel Childs for supposing that this person had been guilty of fraud are not given, nor any fact to sustain the charge; but whether the charge against the deceased secretary is well or ill founded, in no way affects the character of the petitioner.

Although Colonel Childs says that he has "reason to believe" that there was a corrupt agreement between your petitioner and his secretary, by which the secretary was to receive \$1,000, and that he waited the issue of the matter then before the court before collecting it of the petitioner, yet he has never made any such claim of the petitioner, nor shown the slightest reason of his belief of this most groundless imputation.

Not only is there the absence of the slightest evidence to show any collusion or connexion of any kind between the secretary and the petitioner, but the testimony is direct and positive that at the time

when these communications were made by Mr. Domercq through the secretary, he was and had been long before that time absent from the city of Puebla, and returned to that city from Atlisco on the 14th day of October, having been absent from Puebla between that time and the 10th of September previous.

In addition to this, we would refer to the testimony of Captain Webster, who was personally conversant with the entire transaction, as given before the board of officers. He says: "Witness thinks there could have been no dishonest collusion between Port and Wingerski; has had many transactions with Port, and always found him upright and honest in his dealings."

In order to sustain the reputation of Mr. Port as a man of integrity, and a merchant of reputable standing, we ask the attention of the court to a certificate signed by a large number of the principal citizens of Puebla, and duly authenticated. They say, "that since the year 1836, when Mr. Alejo Port, a French citizen, settled in this city, he has observed a very proper conduct, exhibiting in all his commercial transactions an honor, legality, and good faith, without the slightest fault being perceptible in him."

And after all these transactions, and nearly a month after the approval of the doings of the board by General Lane, that officer causes the following letter to be written:

"PUEBLA, December 14, 1847.

"SIR: I am instructed by General Lane to recommend to the General-in-chief Mr. Alexander Port, a Frenchman, and resident of this city. He has been very useful to the troops at this place in procuring clothing, forage, &c., and has ever proved a firm friend of the Americans. Private business requiring his presence in Mexico, Gen. Lane deems it his duty to recommend him to the notice of the General-in-chief.

"I am, very respectfully, your obedient servant,

"THOS. J. WHIPPLE.

"Captain H. L. Scott,

"A. A. General."

In view of the foregoing facts, the following points of law are presented:

The well settled principle of the law of nations clearly shows that the claim of the present petitioner is not only a highly equitable, but strictly legal claim.

Vattel's Law of Nations, book 3, ch. 9, § 164. "As the towns and lands taken from the enemy are called conquests, all movable things constitute the *booty*. This *booty* naturally belongs to the sovereign making war, no less than the conquests; for he alone has such claims on the enemy as warrant him to seize on his goods and appropriate them to himself."

Burlamaqui, ch. 7, § 11, p. 377. "Besides the power which war gives to spoil and destroy the goods of an enemy, it likewise confers the right of acquiring, appropriating, and justly retaining the goods we have taken from him," &c.

Id., ch. 7, § 14, p. 377. "With respect to movable effects, as they may easily be transferred by commerce with the hands of the subjects of a neutral State, often without their knowing that they were taken in war, the tranquillity of nations, the good of commerce, and even the state of neutrality require that they should ever be reputed lawful prizes and the property of the power of whom we hold them."

§ 15, p. 378. "Here a question arises: When is it that things are said to be taken by right of war and justly deemed to belong to him who is in possession of them? Grotius answers, as a civilian, that a man is deemed to have taken movable things by the right of war so soon as they are secured from the pursuit of the enemy; or when he has made himself master of them in such a manner that the first owner of them has lost all probable hopes of recovering them," &c.

§ 26, p. 380. "Another question is, whether things taken in a public and solemn war belong to the State or to the individuals who are members of it, or to those who made the first seizure? I answer, that as the right of war is lodged in the sovereign alone and undertaken by his authority, everything taken is originally and primarily acquired to him, whatever hands it first falls into."

Vattel, book 3, ch. 14, § 212, p. 461. "When a town surrendered to the enemy's army is retaken by those of its sovereign, it thereby, as we have just seen, becomes restored to its former condition, and therefore to all its rights. It is asked, whether it thus recovers such of its possessions which have been alienated by the enemy when he became master of it? First, we are to distinguish between movable goods not tenable by the right of postliminium and immovables. The former belong to the enemy who gets them into his hands, and he may alienate them instantly."

Chitty's Law of Nations, 97. "As to things movable we find by the same section that the law is otherwise. And this, indeed, is of course; for as movable property according to the law of nations is held to be irrecoverable by the original owner in virtue of any postliminium, whenever it has passed into the complete possession of the enemy; much less is such property to be protected from the effect of postliminium when it has not only passed into the complete possession of the enemy, but been by him transferred bona fide to a neutral." (See also 2 Wooddes, p. 441, sec. 34.)

Puffendorf, book 8, ch. 6, § 20. "But by the practice of the world a man makes himself absolute and perpetual master and proprietor of everything he takes from his enemy in a solemn war."

Grotius, lib., 3, ch. 8, § 4. 1. "Sicut autem res, quæ sigulorum fuerant, jure belli iis acquiruntur qui eos sibi subjicerent."

Id. lib., 3, ch. 9, § 14. "De mobilibus generalis in contrarium regula est ut postliminio non redeant, sed in præda sint."

1. The title of the property of Domercq seized by Colonel Childs and sold, vested at once in the purchasers, and he thereby acquired a valid title.

It is not material whether it was known or not to Colonel Childs or to Port that the property belonged to Domercq.

By the right of war, the property of individuals seized by the conquering nation becomes the property of the conqueror, and if sold by

him, a good title was passed and the contract of sale could not be recinded. (Marten's Law of Nations, 289)

Whether Domercq could or could not have redress against Colonel Childs or the government, is immaterial, and cannot affect the title to the property which passed by the sale.

If an illegal seizure is made on the ocean and the property condemned and sold by a decree of a court of admiralty the injured person has a remedy against the government guilty of the aggression; but the sale by the order of the court is clearly good, and passes the title.

Maisonnable et al. vs. Keating, 2 Gallison Rep., 334 :

"The legality of a capture may, under circumstances, exclusively depend upon the ordinances of the government of the captors. If, for instance, the sovereign should, by a special order, authorize the capture of neutral property for a cause manifestly unfounded in the law of nations, there can be no doubt that it would afford a complete justification of the captors in all tribunals of prize."

"The acts of subjects, done under the orders of the sovereign, are not cognizable by foreign courts. If such acts be a violation of neutral rights, the only remedy is by an appeal to the sovereign, or by a resort to arms." (*Idem.*)

"A capture, therefore, under the Berlin and Milan decrees or the celebrated Orders in council, although they might be violations of neutral rights, must still have been deemed, as to the captors, a rightful capture, and have authorized the exercise of all the usual rights of war. It is quite another question whether a tribunal of prize would lend its aid to enforce such captures, though perhaps, in the strictness of national law, it would be bound to abstain from all obstruction of the captors." (*Idem.*)

These views, as to the law applicable to this case, are fully sustained by unanimous decision of the court already made in this case, as follows :

The opinion of the court was delivered by Chief Justice GILCHRIST.

"The facts in this case, as they are stated in the petition, are, that on the 12th day of September, 1847, Colonel Childs, the officer commanding at Puebla, ordered Captain Webster to "sell at auction some captured tobacco, and dispose of the proceeds as he will be hereafter directed." In obedience to this order, Captain Webster advertised, on the 16th of October, for sale at auction on the 19th of October, five hundred bales of tobacco. On the 21st day of October, the claimant purchased the tobacco for the price of twenty-five dollars per bale, amounting to the sum of twelve thousand dollars, for which he paid \$8,000 in cash, and gave the United States credit for \$4,000, they being then indebted to him for supplies furnished the army.

The first question that arises is, what are the rights and liabilities of the claimant and the United States after the sale of the tobacco and the payment of the price by the claimant?

In this case there were all the elements necessary to constitute a contract. The United States and Mexico were at war. The American army was in actual possession of a considerable portion of Mexico,

and, by the law of nations, had a right to seize the property of the Mexican government as lawful prize. Colonel Child's had, for the time being, supreme civil and military authority in the military department of Puebla, and in his then existing capacity he represented the United States, whose officer and servant he was. His authority, as the head of the army, could not be resisted; for this was especially a case where, from necessity, the laws must be silent in the presence of a victorious army.

The principles regulating the rights of nations at war, when an army is in possession of an enemy's country, are clearly established by the writers on the law of nations. "When the sovereign or ruler of a State declares war against another sovereign, it is understood that the whole nation declares war against another nation." * * Hence, these two nations are enemies, and all the subjects of the one are enemies to all the subjects of the other."—Vattel, b. 3, ch. 5, § 70. "Everything, therefore, which belongs to that nation, to the State, to the sovereign, to the subjects, of whatever age or sex—everything of that kind, I say, falls under the description of things belonging to the enemy."—Ibid., § 73. "We have a right to deprive our enemy of his possessions, of everything which may augment his strength, and enable him to make war."—Ibid., b. 3, ch. 9, § 161. "As towns and lands taken from the enemy are called *conquests*, all movable property taken from him comes under the denomination of *booty*. This *booty* naturally belongs to the sovereign making war, no less than the conquests, for he alone has such claims against the hostile nation as warrant him to seize on her property and convert it to his own use."—Ibid., § 164. "The property of movable effects is vested in the enemy from the moment they come into his power."—Ibid., b. 3, ch. 13, § 196. As to movables captured in a land war, it has been sometimes stated to be merely requisite that the property shall have been twenty-four hours in the enemy's hands; but other writers hold that the property must have been brought *infra præsidia*—that is, within the camps, towns, ports, or fleets of the enemy; and others have drawn lines of an arbitrary nature.—Marten's Law of Nations, 290, 291; 2 Wooddes, Vin. L., 444, § 34. But in respect to maritime captures, a more absolute and certain species of possession has been required, in order to obviate the right of postliminium, such as a sentence of condemnation, to give a neutral purchaser a title to a prize vessel.—Case of the Flad Oyen, 1 Rob., 134; 8 T. R., 270. "Immovable possessions, lands, towns, provinces, &c., become the property of the enemy who makes himself master of them; but it is only by the treaty of peace, or the entire submission and extinction of the State to which those towns and provinces belonged, that the acquisition is completed, and the property becomes stable and perfect." (Vattel, b. 3, ch. 13, § 197.) The conqueror who takes a town or province from his enemy cannot justly acquire over it any other rights than such as belonged to the sovereign against whom he has taken up arms. War authorizes him to possess himself of what belongs to his enemy; if he deprives him of the sovereignty of that town or province he acquires it, such as it is, with all its limitations and modifications.—Ibid., § 199.

In a condition resulting from a state of war, if property be seized, under an erroneous supposition that it belongs to the enemy, it may be liberated by the proper authorities; but no action can be maintained against the party who has taken it in a court of law. In England no municipal court, whether of common law or of equity, can take cognizance of any questions arising out of hostile seizure.—*Le Caux vs. Eden*, 2 Dougl., 573. So, if booty be taken under the color of military authority by an officer under the supposition that it is the property of a hostile State or of individuals which ought to be confiscated, no municipal court can judge of the propriety or impropriety of the seizure; it can be judged of only by an authority delegated by his majesty, and by his majesty ultimately, assisted by the lords in council. There are no direct decisions on such questions, because, as stated by Lord Mansfield, in *Lindo vs. Rodney*, Dougl., 313, they are cases of rare occurrence.—*Le Caux vs. Eden*, Dougl., 592.

It is to be remembered that we are now examining this case upon the supposition that the allegations in the petition are true, and the general question is, whether, supposing them to be true, a proper case is presented for the taking of testimony. The United States were in possession of a quantity of tobacco captured from the enemy during the war with Mexico. Under this general question the first inquiry is, whether, when a person sells personal property in his possession, there is an implied warranty that he has a title to such property.

In most of, if not all, the cases in this country, wherever the question has been raised, it has been held that in every sale of personal property there is an implied warranty of title. Some of the decisions to this effect are, *Defreeze vs. Trumper*, 1 Johns., 274; *Bayard vs. Malcolm*, *ibid.*, 469; *Rew vs. Barber*, 3 Cowen, 280; *Case vs. Hall*, 24 Wend., 102. In *Vibbard vs. Johnson*, 19 Johns., 78, it is said: "There is no doubt that in every sale of a chattel for a sound price there is a tacit and implied warranty that the vendor is the owner, and has a right to sell." In *Coolidge vs. Brigham*, 1 Metc., 551, the court said: "In contracts of sale warranty is implied. The vendor is always understood to affirm that the property is his own. This implied affirmation renders him responsible if the title is defective. In *Boyd vs. Bopst*, 2 Dale, 91, it was said by the court: "The possession of chattels is a strong inducement to believe that the possessor is the owner, and the act of selling them is such an affirmation of property that on that circumstance alone, if the fact should turn out otherwise, the value can be recovered from the seller." There are numerous other cases to the same effect, which need not be particularly adverted to for the present purpose. The same doctrine is stated in *Story on Contracts*, § 535, where numerous English cases are cited by the author in support of his position.

In the 1 Law Reporter United States, 272, there is a careful and discriminating analysis of the decisions upon this point by Mr. Pike, of Arkansas, in which the writer comes to the conclusion that the law of England on this subject is like the civil law, and that there is an implied warranty, not of title, but of undisturbed possession and enjoyment. It is immaterial in the present case what is the precise character of the implied warranty, whether it be one of title or of peaceable

possession only, because the United States were not only in possession and sold the property, but it has been taken from the possession of the purchaser, who is seeking to recover damages for the breach.

In judicial sales, where property is sold by the marshal under an order of court, it is held that no warranty is implied. (The Monte Allegre, 9 Wheat., 644.) But this was not a judicial sale. It was simply a sale by the United States, acting through their officers in an enemy's country, of property in their possession to which they claimed a title by the rights of war; and we see no reason why they should stand in any better position, in regard to property in their possession than a private citizen. The sale was in obedience to an order from the commanding general to his military subordinate. We cannot regard the general as a court of law, or Captain Webster as an officer of a court; for this would tend to confound all the distinctions that exist between a state of peace and a state of war in regard to the rights of property.

If, then, there be nothing in the other facts in the case to alter or modify the conclusion, the claimant must be held to have established a right of action against the United States.

But the counsel for the claimant puts his case upon still another ground. He contends that the tobacco belonged to the United States by the rights of war and of conquest; that they sold it to him, and then took it away from him, making him thereby liable in damages to his vendees.

That upon the facts stated in the petition we must consider the tobacco as properly captured in war by the army of the United States, we think there is no doubt. It was taken by an authority which, for the time being, was supreme. Mexico, so far as it was actually occupied by a competent military force, was for the time a conquered country. In the rights of conquest all ordinary civil jurisdiction and remedies were merged. In all that the commanding officer did, so far as he was justified by the law of nations, he represented the country by whose authority he was in command of a military force. It was by this authority, under the law of nations, that the tobacco must for the present be considered to have been captured, and also that it was the property of the enemy. When captured, it was not the private property of the captor, but it became the property of the sovereign, according to Vattel—in this country of the United States. The people, acting through the only agents who could, from the necessity of the case, be recognised—that is, the officers in command—sold it to the claimant, who paid the consideration for it. It then became *his* property, and, after such a sale and payment, the United States had no greater right to take the property into their possession, without indemnifying those who might have a claim to it, than any individual would have to take property from his vendee on the ground that he had no right to sell it.

It appears from the petition, that, after the sale of the tobacco, the petitioner was informed that it was claimed by a merchant of Puebla, by the name of Domercq, and that a board of inquiry was convened by order of General Lane, consisting of four officers of the army, for the purpose of examining into the matter, a majority of whom reported

that the tobacco was not at the time of the sale the property of the United States, and they awarded the possession and ownership thereof to Domercq, and that the consideration paid by the claimant should be returned to him, which was accordingly done. Subsequently, upon its being reported to General Lane that the last buyer of the tobacco refused to give up the key of the store-house, an officer and a file of men forcibly seized and delivered the tobacco to Domercq.

This must be considered as the act of the United States. It stands on the same ground with the sale of the tobacco. The United States, through their officers, were in the actual possession of the supreme civil and military authority. With such a responsibility upon him, the commanding officer must *ex necessitate* act with promptness and decision. In a state of war, where the ordinary tribunals are silent, a nation must expect to incur the risk of pecuniary liability for the acts of its officers in a foreign country, whose course of conduct must be determined by what seems best under existing circumstances. It would be unreasonable in the extreme to require of military officers, carrying on war abroad, placed in difficult and trying positions, either the experience or the legal skill that would enable them to appreciate the subtle distinctions which at home, and in a time of peace, are applied to the ascertainment of legal rights. It is a necessary consequence of a state of war that the orders of the general can admit neither of argument nor resistance. It is the *nation* that carries on the war, and not the individual officer; and it follows that the nation must be liable for the acts of such agents as it sees fit to employ in the prosecution of its object.

Our conclusion is, that if the allegations in the petition are proved, the claimant is entitled to some damages from the United States. Whether the claimant is entitled to recover any sum beyond the consideration paid by him, by reason of his liability to subsequent vendees, is a question which can more conveniently be examined when all the evidence relating to damages is laid before us. At present, we shall merely order testimony to be taken."

It thus appears that the title acquired by Port, the petitioner, was clearly a valid and legal title; that the various transfers by which the property came at last into the hands of the last holders were also legal and valid conveyances, and that the acts of the United States authorities in Mexico were wholly illegal, and that the government is bound to make compensation for the damages actually sustained. As a consequence of their act, Mr. Port has been subjected to serious loss and damage. Not only has he been obliged to refund the amount of the profit paid on the sale to Abadie, but has been subjected to the damages successively sustained by the several parties to which the sales were made, and for the full amount of which he has been held liable. The rule in relation to governments, as in relation to individuals, is, that the party who suffers an injury of this character shall be fully indemnified for the loss and damage sustained as the direct consequence of the wrongful act. The technical rules at law in relation to the damages in case of failure of title to personal property on an express or implied warranty, do not apply. Here there was no failure of title; the

tobacco sold became absolutely the property of Port, and subsequently of those to whom he made sale ; and the subsequent seizure was wrongful, and is not rendered any less so by the unsuccessful attempt on the part of some officers of the government, without proof or just ground of suspicion, to assail the character of the person injured.

JOHN A. ROCKWELL,
Of Counsel for Petitioner.

IN THE COURT OF CLAIMS.

J. ALEXIS PORT *vs.* THE UNITED STATES.

SOLICITOR'S BRIEF.

Claim for damages arising under a contract by which he purchased certain tobacco in Mexico which had been seized by the commanding officer at Puebla, but of which he was deprived by General Lane when subsequently in command.

MATERIAL FACTS AS UNDERSTOOD BY THE SOLICITOR.

First. When the American army took possession of Puebla, the Mexican government had at that place 2,081 bales of tobacco which was seized by said army by order of Gen. Worth and confiscated for the use of the United States. (Finding of the court, Record, p. 45 ; evidence of Seniriento, Record, p. 40 ; Gen. Worth's Order No. 55, May 20, 1847, Record, p. 48.)

Second. That this tobacco was sold by Capt. Allen to Hargous, about June, 1847, who subsequently sold it to Don Juan Domercq, a Spanish citizen, who took possession of the same.

The court convened to inquire into and determine this matter, found as follows :

" When General Worth entered Puebla, in May, 1847, he seized and caused to be sold upwards of 2,000 bales of tobacco owned by the Spanish government. Hargous became the purchaser, and subsequently sold 2,081 bales of it to Don Juan Domercq, a Spanish citizen. He delivered 1,325 bales at the quartel San José, and the remainder in different parts of the city." (Record, p. 45 ; evidence of Seniriento, Record, p. 40 ; evidence of Dr. Schadler, Record, p. 42 ; evidence of Busbor, Record, p. 44 ; Gen. Worth's order, Record, p. 48 ; Captain Allen's bill of sale and certificate, Record, p. 48.)

Third. That the court, upon full hearing, found that a large quantity of the tobacco purchased by Domercq had been sold, or used or destroyed by the American officers and soldiers, and they awarded him \$34,608, with legal interest, to indemnify him therefor. (Record, p. 46.)

Fourth. That Col. Childs, not knowing that the tobacco had been sold by Capt. Allen, and believing that it still belonged to the United States as a seizure, advertised it for sale, at public auction, on the 19th of September, 1847.

On the 12th of September, 1847, Col. Childs made the following order :

"Captain Webster, a. q. m., will sell at auction some captured tobacco, and dispose of the proceeds as he will be hereafter directed." (Record, p. 29.)

Capt. Webster advertised as follows :

"On the 19th instant there will be sold at public auction, at three o'clock in the afternoon, at the cuartel San José 500 bales of tobacco." (Record, p. 29.)

Colonel Childs says, in his report of February 23, 1848, that his evidence before the court convened at Puebla was entirely correct ; and in that he stated :

"Supposing the tobacco to be the property of the United States, witness directed the quartermaster to sell the same." (Record, p. 35.)

Fifth. The tobacco was sold, either directly, or through second hands, to Port (but which is not certain) for \$24 per bale.

Captain Webster, before the special court at Puebla, testified "that, by order of Col. Childs, he sold (500) five hundred bales of tobacco. The price agreed on with Wingierski was (22) twenty-two dollars per bale, but Wingierski never paid the money, nor took possession of the tobacco, nor in any other way exercised right of property. Wingierski told witness he had sold the tobacco at (\$24) twenty-four dollars per bale to Port. Soon after, (witness thinks the same day,) Port came to witness and told him he would take the tobacco at (\$24) twenty-four dollars per bale ; told Port he might have it. Port paid eight thousand dollars in cash, and the balance was passed to the credit of the United States against Port for supplies of clothing, &c., which he was then and now is furnishing for account of the United States. The tobacco was the same now in controversy before the court." (Record, p. 28.)

Spencer, the interpreter before the court in Domercq's case, testified, that after the siege, when some of the tobacco had been used as breast-works and otherwise, "Colonel Childs instructed Captain Webster to advertise the tobacco stored in the cuartel for sale ; and I wrote the advertirements and had them put upon the corners of the streets. 500 bales of the tobacco were sold to Wingierski at \$22 per bale ; and Wingierski, shortly afterwards, sold it to Port at \$24 per bale. I delivered the 500 bales to Port on the 22d of October, 1847, by order of Captain Webster." (Record, p. 44.)

Both of these witnesses agree that the sale was first made to Wingierski, and that the final delivery was to Port. Webster says Wingierski failed to pay, and he resold to Port at two dollars higher price ; while Spencer says that Port bought of Wingierski. If the latter was the purchaser, and sold his purchase to Port, then Port has no claim upon the government upon his own grounds.

Mr. Marcy, then Secretary of War, thus states the matter :

"It appears incidentally in the proceedings of a board of officers at Puebla, that this tobacco was a part of a quantity belonging to one Domercq, which was seized by General Childs under the belief of its being the property of the Mexican government, and after the siege of Puebla was sold by you (Capt. Webster) at a public sale to one Win-

gierski, and by him to Mr. Port; subsequently, on the claim of the owner, Domercq, it was taken from Port and delivered up." (Record, p. 24.)

Fifth. On ascertaining that the tobacco did not belong to the government at the time of the sale, but to the assignee of its vendee, Port was forbidden to sell the tobacco, and it was finally taken by the agents of the United States and delivered to Domercq, the real and true owner.

Spencer testified:

"I delivered the 500 bales to Port on the 22d of October, 1847, by order of Captain Webster. On the 23d day of October, 1847, Colonel Childs ordered the sales of the tobacco to be stopped, and on the 25th October, 1847, I was ordered by Colonel Childs, through Captain Webster, to deliver to Mr. Domercq the remainder of the tobacco on hand.

* * * * In November I went with a detachment of men to Port's house, under the order of General Lane, and upon being refused the keys, burst open the doors and took the 500 bales of tobacco sold by Wingierski to Port, and delivered it to Domercq." (Record, p. 44.)

Captain Webster addressed the following letter to Port under date of the 30th of October, 1847:

"SIR: You will please suspend the sale of tobacco purchased of me for the present. You are perhaps aware that the whole is claimed by Señor Domercq." (Record, p. 29.)

Sixth. On the 17th of November, 1847, General Lane ordered a court of inquiry, consisting of Colonel Brough, Colonel Dumont, and Captain Pugh, "to inquire into the merits of certain claimants to a lot of tobacco recently sold by Captain Webster, quartermaster." (Record, p. 24.)

Major Young was subsequently substituted in place of Colonel Brough, who was ill. (Record, p. 25.)

Seventh. The court assembled, the parties (Domercq and Port) appeared and presented their claims in writing; witnesses were heard, and the court determined that the tobacco was legally the property of Domercq, and that it should be given up to him, and that Captain Webster repay to Port the \$8,000, and recredit him the \$4,000 which had been charged to him in account to make up the \$12,000 which he had paid for the same. (Record of proceedings, Record, pp. 25 to 28.)

"The claims of both parties were then read, having been presented in writing, (see documents marked A and B,) and the court proceeded to the examination of witnesses." (Record, p. 25.)

Colonel Childs, Domercq, and Captain Webster were sworn. (Record, pp. 25, 28.)

Port appeared and cross-examined Colonel Childs. (Record, p. 27.)

The opinion of the court was as follows:

"They are of the opinion the (500) five hundred bales of tobacco sold by Captain Webster to Mr. Port were, at the time of the said sale, the property of Mr. Domercq, and not the property of the United States, and award the possession and ownership thereof to him, the said Domercq, and that the quartermaster, Captain Webster, pay to Mr. Port eight thousand dollars, (\$8,000,) with interest from the date of its payment to him, and cancel the credit of four thousand dollars

(\$4,000) to the United States in its accounts with Port for clothing, &c., supplied." (Record, p. 28.)

Domercq's statement is at p. 30 of the Record, and Port's at p. 33.

Eighth. General Lane approved of these proceedings.

Webster says: "General Lane approved the proceedings and ordered me to carry them into effect." (Record, p. 77.)

Ninth. When Port bought this tobacco he knew that it belonged to Domercq, and not to the United States, though the officer ordering the sale and the one selling did not know that fact.

On the hearing between Port and Domercq the latter was sworn at Port's request and testified:

"The first time I ever heard anything on the subject, (the tobacco,) was one day when Port called, in my hearing, to the son of the Spanish consul, and asked him if he did not wish to join him in the purchase of the tobacco; the reply was, 'no, for it is the property of a friend, and you will make yourself liable for reclamations.' Some day or two after Port told witness he had purchased five (500) hundred bales of tobacco, and asked him if he did not wish to join him in the purchase; to which he replied in the negative, for he did not wish to purchase his own property. Port answered that that made no difference, that he could always interpose his claims." (Record, p. 27.)

Colonel Childs, in his letter of February 23, 1849, says:

"Wingierski was my secretary and interpreter. He knew full well that the tobacco did not belong to the United States; for Domercq told him so, and wished to see me on the subject, but was refused admission by Wingierski under the plea that I was engaged. Mr. Port must have known that this tobacco had been sold but a few months before. He must have known that all the tobacco in Puebla had been seized by General Worth, and publicly sold." (Record, p. 34.)

Colonel Childs in his letter of February 23, 1848, says:

"That I am convinced that both my secretary and Mr. Port knew that this tobacco had been sold by Captain Allen, and that the fact was kept from me for fraudulent purposes, and finally hastened, in my opinion, the death of Mr. Wingierski, when he found out that the facts of the case had come to my knowledge from other sources; therefore I do not consider Port entitled to damages." (Record, p. 35.)

Tenth. The tobacco was purchased by Port at one-half of its actual value.

Port states that he purchased the tobacco at \$24 per bale. (Record, p. 3.) It was worth twice that sum, as proved before the court assembled at Puebla, and Domercq was compensated at this rate.

"The board also find that 8 *arobas* constitute a bale of tobacco, and that tobacco of the same quality as that lost by Domercq was worth, about the first of August, 1847, \$6 per *aroba*, or 25 pounds." (Record, p. 46.)

Eleventh. There is no proper evidence that Port sold, or sustained any damage by selling, the tobacco in question, or otherwise; but that, on the contrary, it remained in his possession at the time that it was taken and delivered to Domercq, the true owner.

Mr. Port, in his petition, says he has been "subjected to the necessity of making full indemnification to subsequent purchasers for the losses sustained by them, respectively, as well as the direct injury arising from the annulling the contract;" but he furnishes no evidence that he had sold or had been compelled to pay any such loss or damage. The unsigned papers at p. 13 of the record prove nothing, nor would they prove anything if they were signed, and the signatures proved to be genuine. No witness testifies to the fact that Port had sold or paid anything whatever to any body.

Twelfth. There are circumstances which tend to show that he was not liable at all for any subsequent sale; but if he had been originally so liable, that he did not remain so liable.

On the 22d of November, 1847, General Lane made the following order:

"The general commanding directs that Captain Webster, Mr. Port, Mr. Abadie, and Messrs. Gambia & Co., Mr. Gordon Maney, report themselves at headquarters, at 3 o'clock p. m., for the purpose of settling finally the business referring to a lot of tobacco in dispute." (Record, p. 49.)

On the 7th of December, 1847, General Lane made—connected with the above, and as the apparent result thereof—the following order:

"1. All persons who have instituted legal proceedings against Alejo Port, or against any other person or persons for and concerning tobacco purchased by said Port of the depot quartermaster of Puebla, Captain Charles Webster, of public places, are hereby strictly enjoined from all further proceedings in the premises in any court or courts of this country at their peril.

"2. All persons holding writings, contracts, receipts, bills of sale, or other paper or papers conflicting with or adverse to the latter order issued from these headquarters, nullifying all such contracts, bills of sale, or other paper or papers, or transfers, are hereby ordered forthwith to deliver all such contracts, transfers, bills of sale, or other papers, to Lieutenant Alexander Hayes, quartermaster of this brigade." (Record, pp. 49 and 50.)

These orders show that this claimant and other parties who possibly might have had claims upon him were cited before General Lane, and that he, in effect, enjoined them from taking any further proceedings against any person, or against one another, in relation to this tobacco affair.

LEGAL PROPOSITIONS.

FIRST. *Under the laws of war, the American army had the power and authority to seize Mexican tobacco and sell it as the commanding officer saw fit.*

The whole title of all the parties claiming this tobacco rests upon the laws of war. That title was acquired by force, and the property was disposed of by military order, being a continued exercise of the same law of force. The rules of the common law have no applicability to the case. Port knew that the only title he could acquire was that derived from force, and that he held under the military law,

and his remedies, and those against him, were under the law, and not under the common law. All parties acted upon this principle, and they must abide by it in the pursuit of their remedies.

SECOND. *The officers of the American army had full and perfect authority to make and execute all such laws as those in command saw fit, in such manner as they might determine upon, applicable to such cases as the one in question.*

There is no distinct military code declaring rights and prescribing remedies. But the whole rests upon the ground of physical power in the acquisition of title. The sales of property seized are made by virtue of such orders as the commander may from time to time prescribe, and upon no other regulations. Whoever complains of the exercise of this power must apply to this same military authority for redress. In such cases the military power exercises its own functions and determines in its own way the mode and extent of redress. The parties complaining cannot rightfully avoid demanding a remedy under that law, and afterwards apply to other tribunals and ask for the application of other laws to their cases. These latter tribunals may not have the power to administer full justice to either party, and they may not know, nor have the means of executing the laws under which such military title was acquired. Courts of common law jurisdiction are not adapted to the consideration of such cases. They should be left, as this case was, to the determination of a military tribunal established and empowered to act upon it.

THIRD. *The court convened by order of Gen. Lane had a lawful right to determine in whom the legal title to the tobacco was vested, and that determination was conclusive.*

The civil courts were without jurisdiction or power at Puebla, except such as the conquerors permitted them to exercise. The latter, under the laws of war, had the undoubted right to institute all such tribunals as the conquest rendered convenient. Gen. Lane determined, and no one has the right to reverse that determination, that a military court should convene to determine who owned the tobacco. The parties came before that court, and Port introduced a witness, (Domercq,) who was sworn and testified, and that court adjudicated upon the question, declaring it not to be the property of Port, but that it belonged to Domercq. Without authority to adjudicate upon such questions, nothing could be settled where armies are stationed or proceed in an enemy's country. These tribunals are the only means of insuring justice, and were properly resorted to.

FOURTH. *Port, in submitting to the tribunal established to investigate and determine his claims, became bound to abide its decision, and therefore is concluded from denying that the tobacco did not legally belong to Port, and that, on being refunded the purchase money with interest, he was entitled to no further indemnity.*

After having submitted himself to the court established to hear his claim to the tobacco, and after having become active in asserting his own claim and in trying to defeat that of Domercq, and after having

received back his money in the execution of its decree, Port cannot deny the power of the court, nor dispute the validity of its decree. That tribunal entered upon the duty of doing justice, and we are bound to believe that it succeeded in doing so. That court gave him back his consideration money, with interest. He claimed nothing more. He did not say that he had sold at an advance and was liable to damages, or that he had paid them. It is evident that Abadie's name was introduced as a means of inducing the court to adjudge him (Port) the continued possession of the tobacco. He had ample justice done him. But, whether he had or not, that decision was final. None of the superior officers deemed it unjust, and, therefore, none would reverse it on appeal.

FIFTH. But having purchased with a full knowledge of the fact that the United States did not own the tobacco, but that it belonged to Domercq, he has no claim for failure of title to the same.

Mr. Port cannot complain at the result, when he purchased knowing what the officer selling did not, that the United States had no title. He proves by his own witness (Record, p 27) that he knew of the previous sale, and that he bought with the intention of interposing claims, if it should be taken away, on the government. If he had been honest and fair, he would have spoken to Captain Webster about the title, and what he knew of the sale to Hargous and Domercq, which would undoubtedly have led to inquiry and prevented a sale. Colonel Childs and Captain Webster acted in good faith, but Port did not. If ill consequences follow, which were not provided for by the decision of the court, it naturally results from his own course, and they rightfully fall upon his own shoulders.

SIXTH. That after the proceedings restoring to Port the consideration he had paid for the tobacco, he had no legal claim to any indemnification on account of failure of title.

The consideration paid by Port for the tobacco was restored under the decision of a court. This shielded him from loss. The decision was, that he was entitled to so much and no more. This is *res judicata*, and closes the matter; and as full justice was done to him, he has no grounds of complaint, much less for a recovery against the government.

SEVENTH. After the order nullifying all contracts and proceedings on account of said tobacco, no subsequent recovery could be had against Port by his vendee, or any one else claiming under him.

To guard against all possibility of loss to Port, General Lane called the parties whom it might be supposed could disturb Port by claims, and adjudicated the matter, and, in effect, issued a perpetual injunction against them, forbidding all claims against said Port. This closed all claims; and, if he had then been legally liable, it cancelled such liability, and no one could, at any future period, recover against him. This closes all pretence of claim from the supposed claimants on Port.

EIGHTH. *Whether the acts and determinations of the commanding officers or military tribunals in Mexico were right or wrong, this court has no power or authority to adjudicate upon their correctness.*

It cannot be denied that the Puebla military court acted upon Port's case, and made a final adjudication upon it. If it decided rightly, then full justice has been done him. If it decided otherwise, this court is not clothed with the power of an appellate tribunal so as to correct its errors. It can no more review the doings of this court than that of any other court which may have been established under law.

In *Hudson vs. Guestier*, 4 Cranch, 293, it was held that municipal seizures must be regulated by the municipal law, and no foreign court can question the correctness of what was done while acting within its jurisdiction.

In *Craudson vs. Leonard*, 4 Cranch, 434, it was held, that the sentence of a foreign court of admiralty, condemning a vessel for a breach of blockade, is conclusive of the fact in an action on the policy of insurance.

In *Kemp's lessee vs. Kennedy*, 5 Cranch, 173, it was held, that when an inferior county court in New Jersey having jurisdiction to judge in cases of inquisition of treason, its judgment, although clearly erroneous, was not void, but was conclusive, because it had jurisdiction.

In *Hopkins vs. Lee*, 6 Wheat., 109, it was held, that a judgment or decree of competent jurisdiction is conclusive, wherever the same matter is again brought in controversy, although the rule does not apply to points which come only collaterally under consideration, or are only incidentally considered, or can only be argumentatively inferred from the decree.

In *Elliot vs. Piersol*, 1 Peters, 328, p. 340, the Supreme Court said: "We agree that if the county court had jurisdiction, its decision would be conclusive." "Where a court has jurisdiction, it has a right to decide every question that occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought, even prior to reversal in opposition to them."

In *Thompson vs. Tolmie*, 2 Pet., 157, it was held, that when the proceedings of a court of competent jurisdiction are brought before another court collaterally, they are by no means subject to all the exceptions which might be taken to them on a direct appeal. The general and well-settled rule of law in such cases is, that when the proceedings are collaterally drawn in question, and it appears on the face of them that the subject-matter was within the jurisdiction of the court, they are voidable only. The errors and irregularities of any suit are to be corrected by some direct proceeding, either in the same court to set them aside, or in an appellate court."

In the *United States vs. Nourse*, 9 Pet., 8, it was held: "It is a rule to which no exception is recollected, that the judgment of a court

of competent jurisdiction, while unreversed, concludes the subject-matter as between the same parties. They cannot again bring it into litigation."

In *Voorhees vs. The Bank of the U. S.*, 10 Pet., 449, p. 473, it was held, that "so long as a judgment remains in force it is in itself evidence of the right of the plaintiff to the thing adjudged, and gives him a right to process to execute the judgment; the errors of the court, however apparent, can be examined only by an appellate power; and by the laws of every country a time is fixed for such an examination, whether in rendering judgment, issuing execution, or enforcing it by process of sale or imprisonment." "A judgment or execution irreversible" by a superior court cannot be declared a nullity by any authority of law, if it has been rendered by a court of competent jurisdiction of the parties, the subject-matter, with authority to use the process it has issued; it must remain the only test of the respective rights of the parties to it."

In *Strother vs. Lucas*, 12 Pet., 410, it was held, that no principle can be better established by the authority of the Supreme Court than "that the acts of an officer to whom a public duty is assigned by his king, within the sphere of his duty, are *prima facie* to be taken to be within his power." "The principles upon which it rests are believed to be too deeply founded in law and reason ever to be successfully assailed."

In *Wilcox vs. Jackson*, 13 Pet., 498, p. 511, the Supreme Court said: "The acts of Congress have given to the registers and receivers of the land offices the power of deciding upon claims to the right of pre-emption; that upon these questions they act judicially; that no appeal having been given from their decision, it follows as a consequence that it is conclusive and irreversible. This proposition is true in relation to every tribunal acting judicially, whilst acting within the sphere of their jurisdiction, where no appellate tribunal is created; and even when there is such appellate power, the judgment is conclusive when it only comes collaterally into question so long as it is unreversed. But directly the reverse of this is true in relation to the judgment of a court acting beyond the pale of its authority."

In *Cocke vs. Halsey*, 16 Pet., 71, it was held, that "in every instance where a tribunal has decided upon a matter within its regular jurisdiction, its decision must be presumed proper, and is binding until reversed by a superior tribunal; and cannot be affected, nor the rights of persons depending upon it impaired by any collateral proceeding."

In *The Philadelphia & Trenton R. R. Co. vs. Stimson*, 14 Pet., 448, p. 458, the Supreme Court said: "The patent was issued under the great seal of the United States, and is signed by the President and countersigned by the Secretary of State. It is a presumption of law, that all public officers, and especially such high functionaries, perform their proper official duties, until the contrary is proved. And when, as in the present case, an act is to be done, or patent granted, upon evidence and proofs to be laid before such officer, upon which he is to decide, the fact that he has done the act or granted the patent, is *prima facie* evidence that the proofs have been regularly made, and

were satisfactory. No other tribunal is at liberty to re-examine or controvert the sufficiency of such proofs, if laid before him, when the law has made such officer the proper judge of their sufficiency and competency."

In *Williams vs. The United States*, 1 How., 290, it was held, that "the acts of the court must, in the first instance, be *presumed* to be regular, and in conformity with settled usage, and are conclusive until reversed by competent authority."

In *Grignon's Lessee vs. Astor*, 2 How., 319, the Supreme Court held in relation to a county court in Michigan, that "it was for the court to decide upon the existence of the facts which gave jurisdiction; and *the exercise of the jurisdiction warrants the presumption that the facts* which were necessary to be proved, were proved."

In *Lessee of Hickey vs. Stewart*, 3 How., 750, the court said that the jurisdiction of a court over the subject matter could alone be inquired into.

In *Simpson vs. Hart*, 1 John. Ch. R., 94, it was held, that the decision of a court of competent jurisdiction was *res judicata*, and was conclusive and binding upon all other courts.

NINTH. *The United States did not warrant the title to the property sold.*

There was no express warranty of title in this case. No person is authorized, under the laws of war, to warrant title to property seized. The government, when it sells, conveys only such title as it has. Port knew what his title was. He took it subject to all the hazards which might exist. The government acts by agents, and it authorizes those agents to act legally and not illegally. Colonel Childs had power to sell government property, and not that of an individual. Captain Webster had the same power, and no more. Both were limited to selling the property of the government.

TENTH. *The United States are not liable for the torts or wrongful acts of its officers not committed by its orders.*

The United States can only act through the instrumentality of agents. When such agents act within their legitimate duties, the government is bound by their lawful acts. If these conform to the directions of the law or their lawful superiors, the United States are bound to protect them from the consequences of such acts. If they act without authority and illegally, the government is in no way responsible, but the agents are personally liable for their own illegal acts. In this case the authority was to sell tobacco belonging to the United States. Their duty and power stopped there. Whatever was done beyond was without authority. If Colonel Childs ordered and Capt. Webster sold the tobacco of any other person, both acted without authority, and their acts were not within their duty, and cannot bind the government. They became, by such sale, personally liable. Whether the government will protect them, is a question between them and the government. The principles upon which the government acts are shown in the opinion of Attorney General Black, in his opinion in Capt. Wilkes's case, dated the 14th of July, 1857, and are as follows:

"Captain Wilkes, while in command of the exploring expedition, caused one of his men to be punished for disobedience of orders. After his return the man brought an action of trespass against Capt. Wilkes, which, after several trials, was abandoned by the plaintiff.

"I consider the decision of the Supreme Court and the final termination of the cause, under an opinion given by that tribunal, as establishing fully that the orders disobeyed by the plaintiff were the lawful orders of his superior officer, and that the punishment for such disobedience was inflicted by Capt. Wilkes in the discharge of his proper duty.

"Capt. Wilkes suffered seriously by this litigation; for though it was finally determined in his favor, his defence put him to a heavy expense, besides the trouble and vexation of it. He now demands that the government will reimburse those expenses, and you ask whether, in my opinion, his claim is valid.

"When an officer of the United States is sued for doing what he was required to do by law or by the special orders of the government, he ought to be defended by the government. This is required by the plain principles of justice as well as by sound policy. No man of common prudence would enter the public service if he knew that the performance of his duty would render him liable to be plagued to death with lawsuits which he must carry on at his own expense. For this reason it has been the uniform practice of the federal government, ever since its foundation, to take upon itself the defence of its officers who are sued or prosecuted for executing its laws.

"The following are some of the cases in which this has been done: See *Mitchell vs. Harmony*, 13 How., 115, 10 U. S. L., 727; *Elliott vs. Swartout*, 10 Peters, 137; *Curtis vs. Martin*, 30 How., 106; *Tracey vs. Swartout*, 10 Peters, 80; *Lawrence vs. Allen*, 7 How., 784; *Lawrence vs. Coswell*, 13 How., 488; *Greely vs. Thompson*, 10 How., 225; *Maxwell vs. Ring*, 16 How., 147; *The United States vs. Guthrie*, 17 Howard, 284; *The United States vs. Booth*, 18 How., 476; *Greely vs. Burgess*, 18 How., 413; *Stairs vs. Peaslee*, 18 How., 521; *Gelston vs. Hoyt*, 3 Wheaton, 247; *Fleming vs. Page* 9 How., '03; *Kendall, Postmaster General vs. United States*, 12 Pet., 524; *Marbury vs. Madison*, 1 Cr., 137.

"In *Little vs. Barreme*, 2 Cr., 170, although the government did not assume the defence, it assumed the judgment recovered against Captain Little, and paid interest and charges. (6 U. S. L., 63.)

"In *Little vs. Barreme*, 2 Cr., 170, the government took no part in the defence, but it afterwards assumed the judgment, and paid it with interest and all charges.

"If an officer sued for doing his duty carries on his own defence without appealing to the government for aid during the pendency of the cause, I think he has a just claim, after it is determined, to be placed in as good a condition as he would have been if the government had taken the defence on itself; in other words, to be repaid the sum he is out of pocket. Of course he is not to be allowed any unreasonable or extravagant expenses.

"I see no reason why Capt. Wilkes should not have what he asks."

If the property sold by Captain Webster was not such as he was

authorized to sell, the sale was void, and conveyed no title, and the government was not responsible.

But the officers of the army then in command in Puebla acted fairly and properly. When it was questioned whether the tobacco was public or private property, a court was appointed, and those interested, including the present claimant, were called upon to show what their rights were. When it was determined that the tobacco was private property, it was ordered to be delivered to the proper owner, and the purchaser (Port) had his purchase money refunded; and subsequently all persons were forbidden to sue him in consequence of any contracts he might have made. Although not liable for the acts claimed to be illegal, still the government, through General Lane, sought to do, and actually did, justice to all parties.

ELEVENTH *The claimant has not shown that he sustained any damages by occasion of his purchase.*

Mr. Port paid \$12,000 for the tobacco in question, and that was refunded to him with interest; so that he has lost nothing.

It is true, he alleges that he had sold the tobacco at an advance, and had to pay his vendee the amount of that advance; but this fact is not proved.

The tobacco was found in *his possession* when it was taken and delivered to Domercq. It had not been *out of his possession* after his purchase. He makes no proof of sale to Abadie, nor of having paid him, or any one else, anything by way of damages.

But if he had made proof of these facts, it would not authorize him to recover of the United States what he might have sustained by his dealings with others after his purchase. He should have proved these facts before the court at Puebla; but he did not. He received his consideration money back, and under the military orders then in force in Puebla no one could recover against him on account of the tobacco in question. General Lane had ordered Abadie, and all those who are claimed to have been subsequent purchasers, to come before him on the subject of this tobacco. It is not to be presumed that they came, as he afterwards made an express order forbidding further legal proceedings against Port. General Lane had the right to make this order, and it was binding upon all parties, and no one could proceed further against Port; and there is no proof that any one ever did so. The matter was adjudged and ended, and must forever remain so.

Mr. Port has not sustained any loss by reason of his having sold the tobacco, and can never do so; and therefore this ground of complaint fails him.

He did not even pretend before the court that he had lost anything by selling to Abadie. But he simply set up, by way of protecting the tobacco from the claim of Domercq, that he had sold it to another.

If he had really sold the tobacco before he was forbidden to do so, and had really sustained damages, or was liable to sustain them, it was his duty to have shown that fact by proper evidence before the court which heard his case, and in that event, if right and proper,

and he had not been in fault about the matter, they could, and doubtless would, have awarded him full indemnity. But he made no such claim, and offered no such proof, and he is therefore bound to be content with what was awarded to and received by him. He cannot complain that the court did not award him a measure of damages which he did not claim or prove.

R. H. GILLET, *Solicitor*.

FEBRUARY 25, 1859.

J. ALEXIS PORT *vs.* THE UNITED STATES.

The opinion of the Court was delivered by Chief Justice GILCHRIST.

The facts in this case, as they are stated in the petition, are, that, on the 12th day of September, 1847, Colonel Childs, the officer commanding at Puebla, ordered Captain Webster to "sell at auction some captured tobacco, and dispose of the proceeds as he will be hereafter directed." In obedience to this order Captain Webster advertised, on the 16th of October for sale, at auction, on the 19th of October, five hundred bales of tobacco. On the 21st day of October the claimant purchased the tobacco for the price of twenty-five dollars per bale, amounting to the sum of twelve thousand dollars, for which he paid \$8,000 in cash, and gave the United States credit for \$4,000, they being then indebted to him for supplies furnished the army.

The first question that arises is, what are the rights and liabilities of the claimant of the United States after the sale of the tobacco and the payment of the price by the claimant.

In this case there were all the elements necessary to constitute a contract. The United States and Mexico were at war. The American army was in actual possession of a considerable portion of Mexico. and, by the law of nations, had a right to seize the property of the Mexican government as lawful prize. Colonel Childs had, for the time being, supreme civil and military authority in the military department of Puebla, and in his then existing capacity he represented the United States, whose officer and servant he was. His authority, as the head of the army, could not be resisted; for this was especially a case where, from necessity, the laws must be silent in the presence of a victorious army.

The principles regulating the rights of nations at war, when an army is in possession of an enemy's country, are clearly established by the writers on the law of nations. "When the sovereign or ruler of a State declares war against another sovereign, it is understood that the whole nation declares war against another nation." * * * "Hence, these two nations are enemies, and all the subjects of the one are enemies to all the subjects of the other."—Vattel, B. 3, ch. 5, § 70. "Everything, therefore, which belongs to that nation, to the State, to the sovereign, to the subjects, of whatever age or sex—everything of that kind, I say, falls under the description of things belonging to the enemy."—*Ibid.*, § 73. "We have a right to deprive our enemy of his possessions, of everything which may augment his

strength, and enable him to make war.”—*Ibid.*, B. 3, ch. 9, § 161. “As towns and lands taken from the enemy are called *conquests*, all movable property taken from him comes under the denomination of *booty*. This *booty* naturally belongs to the sovereign making war, no less than the conquests, for he alone has such claims against the hostile nation as warrant him to seize on their property and convert it to his own use.”—*Ibid.*, § 164. “The property of movable effects is vested in the enemy from the moment they come into his power.”—*Ibid.*, B. 3, ch. 13, § 196. As to movables captured in a land war, it has been sometimes stated to be merely requisite that the property shall have been twenty-four hours in the enemy’s hands; but other writers hold that the property must have been brought *infra præsidia*—that is, within the camps, towns, ports, or fleets of the enemy; and others have drawn lines of an arbitrary nature.—Marten’s Law of Nations, 290, 291; 2 Wooddes, Vin. L, 444, § 34. But in respect to maritime captures, a more absolute and certain species of possession has been required, in order to obviate the right of postliminium, such as a sentence of condemnation, to give a neutral purchaser a title to a prize vessel.—Case of the *Flad Oyen*, 1 Rob., 134; 8 T. R., 270. “Immovable possessions, lands, towns, provinces, &c., become the property of the enemy who makes himself master of them; but it is only by the treaty of peace, or the entire submission and extinction of the State to which those towns and provinces belonged, that the acquisition is completed, and the property becomes stable and perfect.”—Vattel, B. 3, ch. 13, § 197. The conqueror who takes a town or province from his enemy cannot justly acquire over it any other rights than such as belonged to the sovereign against whom he has taken up arms. War authorizes him to possess himself of what belongs to his enemy; if he deprives him of the sovereignty of that town or province, he acquires it, such as it is, with all its limitations and modifications.—*Ibid.*, § 199.

In a condition resulting from a state of war, if property be seized under an erroneous supposition that it belongs to the enemy, it may be liberated by the proper authorities; but no action can be maintained against the party who has taken it in a court of law. In England no municipal court, whether of common law or of equity, can take cognizance of any questions arising out of hostile seizure.—*Le Caux vs. Eden*, 2 Dougl., 573. So if booty be taken under the color of military authority, by an officer under the supposition that it is the property of a hostile State or of individuals which ought to be confiscated, no municipal court can judge of the propriety or impropriety of the seizure; it can be judged of only by an authority delegated by his Majesty, and by his Majesty ultimately, assisted by the Lords in Council. There are no direct decisions on such questions, because, as was stated by Lord Mansfield in *Lindo vs. Rodney*, Dougl., 313, they are cases of rare occurrence.—*Le Caux vs. Eden*, Dougl., 592.

It is to be remembered that we are now examining this case upon the supposition that the allegations in the petition are true, and the general question is, whether, supposing them to be true, a proper case is presented for the taking of testimony. The United States were in

possession of a quantity of tobacco captured from the enemy during the war with Mexico. Under this general question the first inquiry is, whether, when a person sells personal property in his possession, there is an implied warranty that he has a title to such property.

In most of, if not all, the cases in this country, wherever the question has been raised, it has been held that in every sale of personal property there is an implied warranty of title. Some of the decisions to this effect are, *Defreeze vs. Trumper*, 1 Johns., 274; *Bayard vs. Malcolm*, ibed., 469; *Rew vs. Barber*, 3 Cowen, 280; *Case vs. Hall*, 24 Wend., 102. In *Vibbard vs. Johnson*, 19 Johns., 78, it is said: "There is no doubt that in every sale of a chattel for a sound price, there is a tacit and implied warranty that the vendor is the owner, and has a right to sell." In *Coolidge vs. Brigham*, 1 Metc., 551, the court said: "In contracts of sale warranty is implied. The vendor is always understood to affirm that the property is his own. This implied affirmation renders him responsible if the title is defective." In *Boyd vs. Bopst*, 2 Dale, 91, it was said by the court: "The possession of chattels is a strong inducement to believe that the possessor is the owner, and the act of selling them is such an affirmation of property that on that circumstance alone, if the fact should turn out otherwise, the value can be recovered from the seller." There are numerous other cases to the same effect, which need not be particularly adverted to for the present purpose. The same doctrine is stated in *Story on Contracts*, § 535, where numerous English cases are cited by the author in support of his position.

In the 1 Law Reporter United States, 272, there is a careful and discriminating analysis of the decisions upon this point by Mr. Pike, of Arkansas, in which the writer comes to the conclusion that the law of England on this subject is like the civil law, and that there is an implied warranty, not of title, but of undisturbed possession and enjoyment. It is immaterial, in the present case, what is the precise character of the implied warranty, whether it be one of title, or of peaceable possession only, because the United States were not only in possession and sold the property, but it has been taken from the possession of the purchaser, who is seeking to recover damages for the breach.

In judicial sales, where property is sold by the marshal under an order of court, it is held that no warranty is implied. (*The Monte Allegre*, 9 Wheat., 644.) But this was not a judicial sale. It was simply a sale by the United States, acting through their officers in an enemy's country, of property in their possession, to which they claimed a title by the rights of war; and we see no reason why they should stand in any better position, in regard to property in their possession, than a private citizen. The sale was in obedience to an order from the commanding general to his military subordinate. We cannot regard the general as a court of law, or Captain Webster as an officer of a court; for this would tend to confound all the distinctions that exist between a state of peace and a state of war in regard to the rights of property.

If, then, there be nothing in the other facts in the case to alter or

modify the conclusion, the claimant must be held to have established a right of action against the United States.

But the counsel for the claimant puts his case upon still another ground. He contends that the tobacco belonged to the United States by the rights of war and of conquest; that they sold it to him, and then took it away from him, making him thereby liable in damages to his vendors.

That, upon the facts stated in the petition, we must consider the tobacco as property captured in war by the army of the United States, we think there is no doubt. It was taken by an authority which, for the time being, was supreme. Mexico, so far as it was actually occupied by a competent military force, was, for the time, a conquered country. In the rights of conquest all ordinary civil jurisdiction and remedies were merged. In all that the commanding officer did, so far as he was justified by the law of nations, he represented the country by whose authority he was in command of a military force. It was by this authority, under the law of nations, that the tobacco must for the present be considered to have been captured, and also that it was the property of the enemy. When captured, it was not the private property of the captor, but it became the property of the sovereign, according to Vattel—in this country, of the United States. The people, acting through the only agents who could, from the necessity of the case, be recognized—that is, the officers in command—sold to the claimant, who paid the consideration for it. It then became *his* property, and, after such a sale and payment, the United States had no greater right to take the property into their possession, without indemnifying those who might have a claim to it, than any individual would have to take property from his vendee, on the ground that he had no right to sell it.

It appears from the petition, that, after the sale of the tobacco, the petitioner was informed that it was claimed by a merchant of Puebla, by the name of Domercq, and that a board of inquiry was convened by order of General Lane, consisting of four officers of the army, for the purpose of examining into the matter, a majority of whom reported that the tobacco was not, at the time of the sale, the property of the United States, and they awarded the possession and ownership thereof to Domercq, and that the consideration paid by the claimant should be returned to him, which was accordingly done. Subsequently, upon its being reported to General Lane that the last buyer of the tobacco refused to give up the key of the store-house, an officer and a file of men forcibly seized and delivered the tobacco to Domercq.

This must be considered as the act of the United States. It stands on the same ground with the sale of the tobacco. The United States, through their officers, were in the actual possession of the supreme civil and military authority. With such a responsibility upon him, the commanding officer must, *ex necessitate*, act with promptness and decision. In a state of war, where the ordinary tribunals are silent, a nation must expect to incur the risk of pecuniary liability for the acts of its officers in a foreign country, whose course of conduct must be determined by what seems best under existing circumstances. It would be unreasonable in the extreme to require of military officers,

carrying on war abroad, placed in difficult and trying positions, either the experience or the legal skill that would enable them to appreciate the subtle distinctions which, at home, and in a time of peace, are applied to the ascertainment of legal rights. It is a necessary consequence of a state of war that the orders of the general can admit neither of argument nor resistance. It is the *nation* that carries on the war, and not the individual officer; and it follows that the nation must be liable for the acts of such agents as it sees fit to employ in the prosecution of its object.

Our conclusion is, that if the allegations in the petition are proved, the claimant is entitled to some damages from the United States. Whether the claimant is entitled to recover any sum beyond the consideration paid by him by reason of his liability to subsequent vendees, is a question which can more conveniently be examined when all the evidence relating to damages is laid before us. At present, we shall merely order testimony to be taken.

IN THE COURT OF CLAIMS.—MAY 31, 1859.

J. ALEXIS PORT, *vs.* THE UNITED STATES.

Judge BLACKFORD delivered the opinion of the Court.

This is a claim for \$18,000 in damages, and interest.

The following are the facts:

During the war between the United States and Mexico, when General Worth and his forces, in May, 1847, took possession of the city of Puebla, he captured there a large quantity of tobacco belonging to the Mexican government. He confiscated this tobacco, and ordered it to be sold. On the 25th of May, 1847, the chief quartermaster, Captain Allen, by order of General Worth, sold 2,081 bales of this captured tobacco to L. S. Hargous; and early in June, 1847, Mr. Hargous sold the same 2,081 bales of tobacco to Don Juan Domercq, a Spanish citizen, resident in the city of Mexico. These sales were made in the city of Puebla, were *bona fide*, and for valuable considerations. At the time of the sale of the tobacco by Hargous to Domercq, 1,325 bales of it were deposited in the *cuartel* (public barracks) of San Jose, in Puebla, and the remainder in other parts of the city. Some time after General Worth and his army had left Puebla for the city of Mexico, Colonel Thomas Childs, the civil and military governor of Puebla, being informed that said tobacco in said *cuartel* belonged to the United States, and supposing it to be so, directed the quartermaster to sell the same. Accordingly, Captain Webster, assistant quartermaster, advertised 500 bales of said tobacco to be sold at the *cuartel* San Jose on the 19th of October, 1847, at public auction. On that day Mr. Port purchased the 500 bales of tobacco from Captain Webster, at \$24 a bale, amounting to \$12,000, which was paid as follows: \$8,000 in cash, and \$4,000 by a credit to the United States in an account for clothing supplied by Port. The tobacco was accordingly delivered to Port. After said sale had been advertised a friend of Domercq called on Colonel Childs and exhibited bills of

sale, which satisfied him that the tobacco was not government property. The colonel immediately sent orders to Captain Webster to stop the sale ; but the sale to Port had then been made. Captain Webster, however, wrote to Port on the 30th of October, 1847, as follows:

“SIR : You will please suspend the sale of tobacco purchased of me for the present. You are, perhaps, aware that the whole is claimed by Señor Domercq.

To this letter Mr. Port answered, on the next day, that, on the 27th instant, he had sold to Mr. John Abadie, of Puebla, the said 500 bales of tobacco. General Lane, in order to ascertain the facts of this case, ordered on the 17th of November, 1847, at Puebla, a board of inquiry to inquire into the matter. The board was accordingly organized, and after hearing the statements of Domercq and Port, and examining fully Colonel Childs and Captain Webster, and also (at Port's request) Mr. Domercq, as witnesses, decided as follows :

“The board, finding no material contradiction in the statements of the different witnesses, deem it unnecessary any further to specify the facts proven than to decide that the testimony supports the substantial allegations of Domercq's petition. They are of opinion that the 500 bales of tobacco sold by Captain Webster to Mr. Port were, at the time of the sale, the property of Mr. Domercq, and not the property of the United States, and award the possession and ownership thereof to him, the said Domercq ; and that the quartermaster, Captain Webster, pay to Mr. Port \$8,000, with interest from the date of its payment to (by) him, and cancel the credit of \$4,000 to the United States in its accounts with Port for clothing, &c., supplied. As to the repayment of the purchase money to Port, Major Young dissents on the following grounds, viz : Port sold the said tobacco to persons not parties to these proceedings, and who may have paid him, the said Port, for the same ; that the quartermaster retain the purchase money until the question as to whom the money shall be paid shall be decided by some competent authority.”

Mr. Port appealed from this decision of the board to Major General Scott, and then to General Butler, both of whom refused to interfere with the decision. The French minister at Washington, early in 1849, presented Mr. Port's claim to the Secretary of State. The necessary information for the Secretary was obtained, namely, reports of Colonel Childs, Captain Webster, and the aforesaid board of inquiry. The Secretary of State, the petition informs us, rejected the claim. The claim was afterwards, in April, 1850, presented to Congress, and, on the 3d of March, 1851, the Committee of Foreign Relations of the House of Representatives reported against the claim.

The claimant contends that by his purchase he obtained a legal title to the tobacco. He says that the taking of the tobacco by Colonel Childs vested the property in the United States, and that, of course, their sale of it to him was valid. The answer to this argument is, that it assumes that Colonel Childs seized the tobacco as enemy's property, and confiscated it accordingly, whereas the fact is entirely otherwise. The tobacco had been captured by General Worth in May, 1847, and

sold directly afterwards, by his order, to Hargous, who sold it in June following to Domercq. Colonel Childs, not knowing of the sale under General Worth's order, and being informed and believing the tobacco to belong to the United States, ordered it to be sold as United States property. But the moment that Colonel Childs discovered that it did not belong to the United States, but that it was the private property of Domercq, he ordered the sale to be stopped. The order, however, came too late. The case stands exactly on the ground of the sale by one individual to another of goods belonging to a third party. Such a sale is absolutely void; and the real owner, notwithstanding the sale, may take the goods wherever he may find them, so that he do not commit a breach of the peace; or he may recover their value from the person in possession, who refuses to deliver them.

In the present case the real owner of the tobacco, Domercq, got possession of his property, and the purchaser, Port, received back his purchase money and interest. The evidence shows that the conduct of Colonel Childs and Captain Webster was perfectly fair in regard to the sale. But the claimant, to enhance the damages, alleges that on the 27th of October, 1847, he sold said tobacco to Mr. Abadie for \$16,500; that Abadie sold it on the 13th of November following to Gormio & Co., for \$17,500; and that Gordon & Murray purchased it on the 15th of the same month for \$21,000, in cash. The allegations in the petition respecting those subsequent sale are not proved; but, if they were, the result would be the same. Neither Colonel Childs nor Captain Webster was authorized by the United States to sell the tobacco in question, which was the property of Domercq, and the purchaser, therefore, could claim nothing from the United States on account of the failure of title beyond the amount of the purchase money received by them, with interest from the time it was received. It is proper, however, here to observe that on the trial before said board, Port put the following question to Domercq as a witness: "Did I not, on several occasions, inform you that I intended to buy the tobacco?" The answer was as follows: "The first time I ever heard anything on the subject was one day when Port called, in my hearing, to the son of the Spanish consul, and asked him if he did not wish to join him in the purchase of the tobacco; the reply to which was: "No, for it is the property of a friend, and you will make yourself liable to reclamations." Some day or two after, Port told witness he had purchased 500 bales of the tobacco, and asked him if he did not wish to join him in the purchase; to which he replied in the negative, for he did not wish to purchase his own property. Port answered that that made no difference; that he could always interpose his claims." This evidence shows that Port was informed before he purchased, that the tobacco belonged to a third person, and also that, before the time when he alleges he sold to Abadie, he was informed that the tobacco was Domercq's.

It appears to us to be clear that, under the circumstances of this case, as the purchase money has been returned to the claimant, with interest, he has received all he was entitled to on account of the want of title to the tobacco, of which he complains.

But, independently of said claim, the petition claims damages for

an alleged trespass in the forcible seizure, by order of the commanding general, of said tobacco and the delivery of it to Domercq. It is only necessary, in answer to this claim, to say that if the act complained of was justifiable, either by the laws of nations or any other law applicable to the case, there is, of course, no ground for complaint. If, on the contrary, the act was in violation of the laws governing such cases, the government is not legally responsible for the trespass, for the plain reason that no officer, civil or military, has authority from the government to commit unlawful acts of trespass.

It is the opinion of the court that the claimant is not entitled to recover.